DOCTORAL THESIS

Directors' Powers and Duties in Vietnam

Pearce, Jeremy

Award date:
2010

Directors' Powers and Duties in Vietnam

Jeremy Seymour Pearce

This thesis fulfils the requirements for the
degree of Doctor of Legal Science in the
Faculty of Law at Bond University

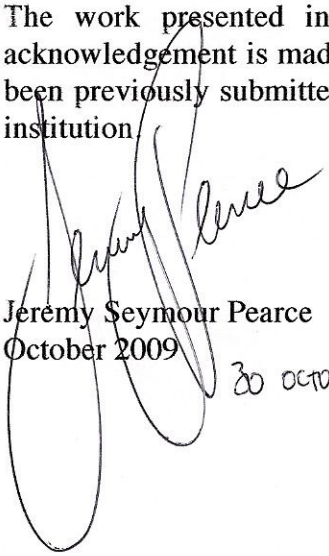
Submitted to the Faculty of Law

October 2009

Certification

This thesis is submitted as final fulfilment of the requirements for the degree of Doctor of Legal Science at Bond University.

The work presented in this thesis is entirely my own, except where due acknowledgement is made in the text for all the material used. This thesis has not been previously submitted for a degree or diploma at this University or any other institution.



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For the believers

Publications arising out of this research

Chapter Nine forms the basis of a paper delivered to the Bond University Centre for Commercial Law 2nd Annual Corporate Governance Seminar in Saigon and Hanoi in September 2009. This paper will be published in the seminar proceedings in a special edition of the Bond University Corporate Governance ejournal.

Acknowledgements

I would like to acknowledge and sincerely thank Professor Jim Corkery for his patient encouragement of my interest in corporate governance, his thoughtful comments on this work and continued support of my academic endeavours. I cannot imagine having a better supervisor. I have greatly appreciated and enjoyed my time with Professor Corkery and will carry many fond memories and lessons with me from this very unique and special person.

It has been a real pleasure to study at Bond University Law School. I would like to thank the Law Faculty at Bond University for their support, encouragement and professionalism. I must concur with Professor Corkery's comment to me as I embarked upon this thesis: 'It's an honour and a privilege to study here' – indeed it is and an experience I will treasure for the rest of my life. There is a real sense of collegiality at Bond Law School, which has made my studies far richer than the experience of progressing through the highs and lows of the doctoral journey. Special mention should go to Professor Mary Hiscock, Professor John Leesing, Associate Professor Liz Spencer, Paul White, Christian Kelly and Andrew Antonopoulos for their efforts throughout my studies.

I am very grateful to all those friends and family who supported, encouraged and believed in me, in particular, Martin Pearce, Linda Willis, Phil and Karen Lance, Dennis and Jan Walker, Kylie, Tami and Eleanor DeCourteney, Rachel Welsh, Maree Piper, Jenny Moalem, Susan Ingram, Madeline Morris, Jenny Offen, Rick Pucci, Jessie Chella, Maria Smith and Olga Angilova.

This thesis would not have been possible without the assistance of the following people:

Dr Net Le, Partner and Thao Tran, solicitor, at AGZI LCT Limited law firm, Ho Chi Minh City (HCMC), Vietnam; Le Cong Dinh, Vice-President of the HCMC Bar and Partner at DC Law, HCMC, Vietnam; Iris Fang, MBA lecturer, RMIT Vietnam; Fred Bourke, Partner, Baker and Mackenzie law firm HCMC, Vietnam; Dr Hai Xuan Bui, Acting Dean, HCMC Law University and Dr Hop Dang, Senior Associate at Allens Arthur Robinson, Hanoi. Also special thanks to Trang Hoang, for her patient translating and support and Linh Vo for her research assistance.

Abstract

This thesis explores the effectiveness of Vietnamese directors' duties and analyses them within the broader context of Vietnamese corporate governance. It argues that Vietnamese corporate law has the core ingredients to evolve a stronger corporate governance model in line with the OECD Principles of Corporate Governance and the "law matters" evidence.

Keywords

Directors' duties, fiduciary duty, corporate governance, limited liability, shareholders, stakeholders, legal personality, proper plaintiff, business judgment rule, statutory derivative action, "law matters"

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Winthrop Investments Ltd v Winns Ltd [1975] 2 NSWLR 666

Woonda Nominees Pty Ltd v Chng (2000) 18 ACLC 627

Young v Ladies' Imperial Club Ltd [1920] 2 KB 523.

Vietnam

AMASCO Materials and Cattle Breeds Joint Stock Company

The Bien Hoa Confectionary Corporation (BIBICA)

Day Sai Gon Manufacturing Services Trading Joint Stock Company

FJSC

FPT Corporation

JLG Company

Minh Phung – Epco

Nam Bac Company

Park Hyatt Saigon Hotel

PetroVietnam Fertilizer and Chemicals

Sajuco

Tuong An Vegetable Oil

The Vietnam Petroleum Transport Joint Stock Company (VIPCO)

Vinaconex

Abbreviations

World Trade Organization (WTO)

Organisation of Economic Cooperation and Development (OECD)

State Securities Commission (SSC)

Asian Development Bank (ADB)

Australian Securities and Investment Commission (ASIC)

Corporate Social Responsibility (CSR)

Securities Trading Centre (STC)

Vietnam Association of Financial Investors (VAFI)

Joint Stock Company (JSC)

Chapter One

Introduction

1.1 Hypothesis and objective

The thesis question is: Do Vietnamese directors' powers and duties in theory and in practice reflect strong corporate governance?

The hypothesis is explored by legal analysis and by analysing the various Vietnamese provisions for directors' powers and duties in light of other more mature corporate governance frameworks, the "law matters thesis" and the OECD Principles of Corporate Governance.

This thesis examines the effectiveness of Vietnamese directors' duties within the context of good corporate governance. This work aims to provide some useful insights, information and recommendations for decision-makers in the field of directors' powers and duties in Vietnam.

1.2 Thesis Statement

The role of directors' duties within good corporate governance structures is critical. Without well defined and properly enforced directors' duties, investors and stakeholders cannot be assured their companies will be run efficiently, effectively and in the best interests of the company. This thesis examines the powers and duties of directors in Vietnam, focusing on the main Vietnamese corporate legislation, the *Law on Enterprises 2005*.

Although there are publications on Vietnamese law in general, there is very little written about Vietnamese company law.[1] Prior to this work, virtually nothing explores the role of directors in Vietnamese corporate law or their powers and duties. Some work has been done in the area of corporate governance in Vietnam, although none of it specifically relates to the role of directors or presents a robust discussion of directors' duties in the context of 'good' corporate governance. This is not an analysis of the role of law in Vietnam or the role of law within the geo-political context of Vietnamese history.[2]

This thesis argues that the current Vietnamese corporate law provides a good platform to evolve into a stronger corporate governance framework. Specific attention needs to be given to investor remedies and enforcement if Vietnam is to comply with the "law matters" evidence and the OECD principles.

1.3 Research approach

The research approach concentrates on legal analysis and comparative law.[3] In approaching the Vietnamese provisions for directors' duties reference is made to other jurisdictions, particularly Australia. This by no means suggests that Australia, or any other jurisdiction for that matter, is beyond reproach regarding corporate governance.

[1]See Gillespie J, "Importing Law Reform: Vietnamese Company Law as a Case Study" in Macmillan F (ed), *International Corporate Law Annual* (Hart Publishing, 2003), Freeman NJ, "Promoting Good Corporate Governance Practices in Vietnam" in Ho KL (ed), *Reforming Corporate Governance in Southeast Asia* (Singapore, ISEAS publications, 2005), Bui H, "Vietnamese Company Law: The Development and Corporate Governance Issues" (2006) Vol 18 Issue 1 *Bond Law Review* 22-44.

[2]For more see Sidel M, *Law and Society in Vietnam* (Cambridge University Press, 2008), Sidel M, "Vietnam The Ambiguities of State-Directed Legal Reform" in Tan PL (ed), *Asian Legal Systems* (Butterworths, 1997), Lockhart G, "Vietnam: Social Order and Business Culture in the Age of Globalisation" in Sampford C, Condlln S, Palmer M, and Round T (eds), *Asia Pacific Governance: From Crisis to Reform* (Ashgate Publishing Co, 2002) and Landau I, "Law and Civil Society in Cambodia and Vietnam: A Gramscian Perspective" (2008) Vol 38 No 2 May *Journal of Contemporary Asia* 244-58.

[3]This does not mean that the thesis is a 'comparative law' thesis. Reference to other jurisdictions is for the purposes of better understanding the Vietnamese provisions. For more see De Cruz P, *Comparative Law in a Changing World 2nd Edition* (Cavendish Publishing, 1999), Zweigert K and Kotz H, *An Introduction to Comparative Law 3rd Edition* (Oxford Press, 1998), Berkowitz D et al, "Economic Development, Legality and the Transplant Effect" (2003) 47 *European Economic Review* 165.

Corporate collapses such as HIH and One.Tel testify to the fallibility of the Australian corporate governance systems.[4] It is fair to say, however, that Australian corporate law is more developed and arguably the most comprehensive in the South Pacific region. For these reasons and because of the relatively easy access for Vietnam to the Australian provisions, Australian references are more prominent. Some use is made of relevant Vietnamese case studies where appropriate.

1.4 "Law matters"

The "law matters" thesis formulated by La Porta et al states:

> The differences in the nature and effectiveness of financial systems around the world can be traced in part to the differences in investor protections against expropriation by insiders, as reflected by legal rules and the quality of their enforcement.[5]

The "law matters" argument is supported by considerable evidence, which appears in various places throughout this thesis. The "law matters" thesis is not without its detractors. Cheffins claims that it is overstated and that "institutional structures can perform the function that "law matters" advocates say the legal system needs to play."[6]

There are two problems with Cheffins' approach. Firstly, the "law matters" argument as outlined above is not solely about the 'law' as Cheffins would lead us to believe. As La Porta et al clearly state, it refers to the "legal rules and the quality of their

[4]For more see Commonwealth, The HIH Royal Commission: The Failure of HIH Insurance *Final Report* (2003).
[5]La Porta R, Lopez-De-Silanes F, Shleifer A and Vishny RW, "Legal Determinants of External Finance" (1997) Vol LII No 3 July *The Journal of Finance* 1131-50 at 1131.
[6]Cheffins BR, "Does Law Matter? The Separation of Ownership and Control in the United Kingdom" (2001) Vol 30 No 2, *The Journal of Legal Studies* 459-484 at 459.

enforcement". Although La Porta et al may rest principally on the 'rule of law', they constantly refer to 'legal rules', 'legal environment' and 'good law enforcement'.[7] That is to say, the measures that are employed to enforce legal rules, along with the broader contextual environment the rules exist in, play an important role in the "law matters" argument. To presume that 'institutions' are not part of this enforcement is naive. Cheffins himself acknowledges this when he states "investors are unlikely to feel confident in a country where judges are corrupt and Court procedures are cumbersome".[8]

The second concern with Cheffins' approach is the problematic claim that it is not the law, but institutions like the stock exchange that regulate corporate behaviour.[9] If regulation is not imposing some form of rule, what is it? How can regulation exist without a rule of some form, be it strictly legal or normative? In turn, Cheffins tries to relegate the "law matters" thesis to apply solely in the realm of strict interpretation of legislation and case law. This may be argued, but it is a weak argument at best, and a moot point that does not detract from the essence of the "law matters" thesis.

To ensure there is no confusion for the purposes of this thesis, the broad meaning of the "law matters" thesis is adopted. In other words, reference to "law matters" implies the broad sense of the term relating to regulation of corporate behaviour. Walker and Fox support this approach when they state:

> We examine prospects for enhancing corporate governance practices in East Asia. The principal insights provided flow from the so-called

[7]Note 5 at 1131.
[8]Note 6 at 468.
[9]Ibid at 472.

> "law matters" thesis. These insights were developed by Rafael La Porta and colleagues, and other scholars working in this vein…These authors argue that corporate governance measures, especially protection of minority shareholders, explain the extent of exchange rate depreciation and stock market decline better than standard macroeconomic measures. A possible explanation is that countries with weak corporate governance, worse economic prospects result in greater expropriation by managers and a larger fall in asset prices. Both lines of research imply that legal corporate governance measures are much more important than previously thought.[10]

Walker and Fox here refer to the broader view of "law matters". They also refer to 'legal obligations' and enforcement of obligations as opposed to legislation alone.[11] This does not mean that legislation is not important. However, legislation is not the only facet of the "law matters" thesis. Good corporate governance relies on good legal systems, and the link between "law matters" and good corporate governance is inescapable. Good corporate governance cannot be achieved by legislation alone, and the "law matters" thesis does not claim otherwise.

1.5 OECD Principles of Corporate Governance

No single code or model of good governance or best practice is universally accepted.[12] However, as a guide to what constitutes the broad building blocks of a good corporate

[10]Walker G and Fox M, "Corporate Governance Reform in East Asia" (2002) Vol 2 No 1 *Corporate Governance* 4-9 at 4.

[11]"Much of the difference in corporate governance systems around the world stems from the differences in the nature of legal obligations that managers have to the financiers, as well as in the differences in how Courts interpret and enforce these obligations." Ibid at 5.

[12]Different countries use different measures to establish their corporate governance frameworks. The essential elements are often similar to, or derived from, a common concept but enacted or deployed in a

governance framework, the OECD Principles of Corporate Governance are most often used as the starting point.

The OECD Principles of Corporate Governance are represented by the following categories:[13]

- Ensuring the basis for an effective corporate governance framework[14]
- The rights of shareholders and key ownership functions[15]
- The equitable treatment of shareholders[16]
- The role of stakeholders in corporate governance[17]
- Disclosure and transparency[18]
- The responsibilities of the board[19]

1.6 Corporate governance

Corporate governance has been defined as "the system by which companies are directed and controlled".[20] McCallum suggests that:

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form unique to that country. As explained in the Chinese context: "The basic function of the Company Law is to protect the legal interests of the company, the shareholders and creditors. However, it is a continuously accumulating and perfecting process to coordinate the interests of third parties and to allocate interests in legal regulation reasonably, according to the different periods of time, circumstances and backgrounds. The current Company Law tends to prefer protecting interests of creditors and the social order, rather than protecting the company and shareholders." Zhao X, "Company Law Reform in China: Its Basic Aims and Values" in Tomasic R (ed), *Corporate Governance: Challenges for China* (China, Law Press, 2005) at 39.

[13]For more see OECD, *OECD Principles of Corporate Governance* (OECD Publications Service, 2004).

[14]"The corporate governance framework should promote transparent and efficient markets, be consistent with the rule of law and clearly articulate the division of responsibilities among different supervisory, regulatory and enforcement authorities." Ibid at 17.

[15]"The corporate governance framework should protect and facilitate the exercise of shareholders' rights." Ibid at 18.

[16]"The corporate governance framework should ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights." Ibid at 20.

[17]"The corporate governance framework should recognise the rights of stakeholders established by law or through mutual agreements and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises." Ibid at 21.

[18]"The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company." Ibid at 22.

[19]"The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders." Ibid at 24.

[20]Sparkes R, "From Corporate Governance to Corporate Responsibility: The Changing Boardroom Agenda" (2003) March/April *Ivey Business Journal* Vol 1 at 2.

> Governance is the organizational machinery through which principals assure that their assets are administered to their satisfaction.[21]

Neither of these definitions helps in deciding what constitutes good governance, or the essence of the system; they describe only the structure or process by which decisions are made.[22] To further compound the problem of understanding corporate governance, Farrar refers to a 'narrow' view and a 'wide' view of corporate governance. The narrow view refers to "control of corporations and to systems of accountability by those in control".[23] The wide view includes

> the entire network of formal and informal relations involving the corporate sector and their consequences for society in general[24]

Farrar's narrow view sits within the realm of McCallum's 'machinery' perspective and provides no further insight into how decisions are made in relation to the machinery. Farrar's wide view is so nebulous that it further confounds the ability to decipher the essence of corporate governance and provide a window into the vast complexity of the mechanisms of corporate governance. Whilst this is problematic it does not necessarily mean we simply discount this approach.

Farrar's wide view notwithstanding, the idea that corporate governance is about the systems or the 'machinery' of company administration has been a focus of the

[21]Ibid.
[22]There is also a wider debate about the "convergence" of corporate governance. For more on this see Gordon JN and Roe MJ, *Convergence and Persistence in Corporate Governance* (Cambridge University Press, 2004) and Coffee JC, "The Future as History: The Prospects For Global Convergence in Corporate Governance and its Implications" (1999) 93 *Northwestern ULR* 641.
[23]Farrar J, *Corporate Governance* (Melbourne, Oxford University Press, 2006) at 3
[24]Ibid at 6.

discourse in this field of law.[25] This view leads to analysis of company structures and processes of decision-making. Directors' powers and duties are just one part of this structure and process. The traditional approach to corporate governance does not provide for considerations or thoughts and values given to decisions, or held by decision makers.[26] This in turn makes it difficult for traditional approaches to corporate governance to address phenomena, familial or cultural traditions and rituals that largely sit outside the influence of company structures and processes. Arguably, this is where Farrar's wide view sits.

Corporate governance is important in trying to improve the processes that companies use to prosper.[27]When companies grow, so in turn do economies and countries.[28] As

[25]"On July 30, 2002, President Bush signed into law the Sarbanes-Oxley Act of 2002, which contains many reforms intended to protect investors by raising corporate governance standards designed to improve the accuracy and reliability of corporate disclosures." Petra ST, "Corporate Governance Reforms: Fact of Fiction?" (2006) Vol 6 No 2 *Corporate Governance* 107-115 at 107. See also Harder W, "What's all the talk about Directors' Ethics?" (2006) *Corporate Governance eJournal Bond University* (http://epublications.bond.edu.au/cgej/), Vinten G, "The Corporate Governance Lessons of Enron" (2002) Vol 2 No 4 *Corporate Governance* 4-9. Leblanc R and Gillies J, "The Coming Revolution in Corporate Governance" (2003) September/October *Ivey Business Journal* 1-11. Ritchie T, "Independent Directors: Magic Bullet or Band-Aid?" (2007) *Corporate Governance eJournal Bond University* (http://epublications.bond.edu.au/cgej/).

[26]"Governance is an ambiguous term that denotes regulation and control, and when coupled with the appellation 'good', has come to mean something like the conformity of domestic regulatory regimes and activities with an internationally recognised ideal or prescribed standard of conduct." Buchan B, "The Moral Physics of the Body Politic: Changing Contours of Corruption in Western Political Thought" Paper presented to the *Australasian Political Studies Association Conference*, University of Adelaide 29 September – 1 October, 2004 at 2. The Asian Development Bank (ADB) governance means "the manner in which power is exercised in the management of a country's economic and social resources for development…. [thus] ADB's concept of good governance focuses essentially on the ingredients for effective management… in essence, it concerns norms of behaviour that help ensure that governments actually deliver to their citizens what they say they will deliver." Asian Development Bank, *Governance* (Asian Development Bank, 2005) at 3-4. For more in general see Van den Berghe L, *International Standardisation of Good Corporate Governance* (Boston, Kluwer Academic Publishers, 1999). For more on Vietnam see also Mekong Capital *Recommendations on Good Corporate Governance Practices in Vietnam* 11 January 2003.

[27]In discussing best practice Cadbury explains: "Two of the planks on which the Code [of best practice] is based are the need for adequate disclosure and for appropriate checks and balances within the governance structure of companies. Disclosure ensures that all those with a legitimate interest in a company have the information, which they need in order to exercise their rights and responsibilities towards it. In addition, openness by companies is the basis of public confidence in the corporate system. Checks and balances within the structure of a company, especially at board level, assist the directors in fulfilling their duty to act always in the interests of the company and guard against undue concentrations of power." Cadbury A, "The Response to the Report of the Committee on the Financial Aspects of Corporate Governance" in Patfield FM, *Perspective on Company Law: 1* (Kluwer Law, 1995) at 25.

[28]For more see Wei Y, *Comparative Corporate Governance* (Kluwer Law International, 2003).

Vietnam emerges economically and socially, corporate governance will become increasingly important.[29]

Another aspect of corporate governance that is hotly debated is the political context within which companies operate. Roe explains governance in terms of the management of the interaction between different forces within the company.[30] He further argues that the various elements of the company reflect broader societal conflict.[31] As a result the specific social and political forces outside the company can influence corporate governance inside the company.[32] It is fair to say that the dynamics of governance are vast and problematic, regardless of the approach taken.

1.7 Literature review

[29]"[The] IFC believes that private sector development is the primary vehicle for sustainable economic growth. In order to encourage economic development – in Viet Nam and elsewhere – companies must operate according to a framework that establishes the rights and responsibilities of management and shareholders. Good [corporate governance] CG helps maximise company value by improving operational efficiency, and enhancing long-term prosperity through better and transparent strategic planning. It also results in greater access to cheaper financing and global investment. In light of the present global economic situation, the improvements that good CG brings – to the company, the shareholder, the sector, and the economy – are vital. Competition will intensify as investment criteria are reviewed. Corporations looking to expand will be increasingly scrutinised. Standards will consequently be raised. In Viet Nam, the recent volatility of the stock market, the recognised need for investor protection, and the expressed investor concerns for transparent business management highlight the need for standards and safeguards…It is difficult to make meaningful comparisons between countries, but I should say that, as in other transitional economies, capital markets in Viet Nam are still in their initial phase of development, and private enterprises tend to be relatively small. It follows then that CG and key concepts like minority shareholder rights and fiduciary duties of company directors are unfamiliar or relatively new." "Vietnam needs better Corporate Governance" (2008) October 30 *Vietnam Business Finance* <http://www.vnbusinessnews.com/2008/10/vietnam-needs-better-corporate.html> 16 May 2009. See also Dao TT, "Corporate Governance and Performance of the Equitised Company in Vietnam" (Unpublished paper 2008).

[30]See Roe MJ, *Political Determinants of Corporate Governance* (Oxford University Press, 2003)

[31]"Owners, usually from the richest strata in the society, cannot be seen to have acquired their wealth too unjustly; otherwise neither managers nor employees will work well for the owners. Managers must be motivated to do their jobs. They cannot run their firms into the ground or divert its wealth to themselves; otherwise owners will not invest and employees will be too uncertain of long-term prospects to work hard for the firm that would soon be run into the ground. And employees must be motivated to work and be unable to appropriate owners' investments; otherwise owners will not invest. Nor can employees be positioned to prevent managers from running the firm; otherwise managers cannot effectively induce the firm to produce." Ibid at 21.

[32]"Conflicts inside the firm either map onto broader social conflicts in a society, or can spill over from firms into political and social conflict. If the society cannot minimize these conflicts, it cannot produce." Ibid at 22.

The literature that relates specifically to Vietnam is scarce and where relevant is noted in the text. This is a review of the broad concepts and material on corporate governance, company theory, and their relationship with directors' powers and duties.

One could contend that, with adequate regulation and accompanying enforcement of compliance, companies would operate within the law by sheer weight of deterrence.[33] The problem with this argument is – how much deterrence is enough? Furthermore, is this fair, equitable and appropriate for all companies, in all regions of the world? Moreover, this approach has clearly failed.

As mentioned above, McCallum's view that corporate governance is about the 'machinery' of the company limits its potential to deal with the complexity of corporate power, and downplays other external factors that also contribute to company decision-making. It is more meaningful to view corporate governance as relating to the administration of power that exists within a company. Who has power? How is power structured or balanced? What are the responsibilities of the custodians of that power? How can the power within the various roles of the company be scrutinised and utilised to ensure maximum benefit for the enterprise and how is that power affected by regulatory measures, both internal and external?

[33]This represents a theoretical proposition and sits in contrast to other findings. See Petra ST, "Corporate Governance Reforms: Fact or Fiction?" (2006) Vol 6 No 2 *Corporate Governance* 107. Also "… there is a temptation to legislate for stringent controls over publicly listed companies. The danger is that such legislation can harm innocent companies and can inhibit them from pursuing business opportunities with a degree of entrepreneurial flair beneficial to shareholders." Maltas JD, "The Demise of HIH: What Part Did Failed Corporate Governance Policies Play?" *Working Paper* (No 05.02) Working Paper Series, School of Business Law, Curtin Business School, Curtin University of Technology, Perth WA at 70.

An approach to corporate governance from an understanding of power rather than of regulation broadens the context within which it can be understood. This perspective in turn may more fully illustrate where regulation is beneficial and meaningful.[34]

If we broaden the understanding of what corporate governance entails, the opportunity then arises to explore more fully the context within which it operates. This broader approach to corporate governance provides the flexibility to understand the specific needs of each company within its individual circumstance.[35] This certainly applies when discussing Vietnamese corporate governance. However, unlike Farrar's 'wide' view, the approach is not so broad as to render it meaningless in applied terms. This approach does not suggest that corporate governance is entirely relative; some problems, such as agency, are universal. It does, however, suggest that governance structures and companies need to be understood from the context in which they operate.

This new approach does not propose that 'machinery'-based regulatory measures should be abandoned, only that regulatory measures alone are not enough.[36] Moreover, this approach will aid in providing effective regulatory measures that are applied in

[34]As already evidenced by Farrar's 'wide' view, the concept of broadening the context of corporate governance is not new – although the specific application to corporate power has not previously been undertaken. Pfeffer explains: "Power has been neglected for several reasons. First the concept of power is itself problematic in much of the social science literature. In the second place, while power is something, it is not everything. There are other perspectives for understanding organisational decision making…And third, the concept of power is troublesome to the socialization of managers and the practice of management because of its implications and connotations." Pfeffer J, *Power in Organisations* (Cambridge MA, Ballinger Publishing Company, 1981) at 2.

[35]The Royal Commission into the collapse of HIH specifically stated that highly prescriptive corporate governance measures should be avoided. Note 4 at Vol 1 at 105.

[36]Another issue related to this the relationship between corruption and regulation – for more on this see Ogus A, "Corruption and Regulatory Structures"(2004) Vol 26, Nos 3&4 July and October *Law and Policy*, 329-346.

ways that are derived from an understanding of how the company works within its particular environment.[37]

Kirby supports the notion of being wary of the role of regulation in corporate governance, from a different perspective. He maintains that we must avoid the temptation to make companies 'playthings' of the law, stifling the spirit of entrepreneurial endeavour.[38] This is not to ignore the need for honesty and integrity in corporate conduct.[39] Instead, it implies that the application of corporate law is couched within a specific context and 'spirit' of the company, that can and should coexist with appropriate regulatory measures.[40]

Entrepreneurial endeavour also sits at the heart of the broad historical perspective of the company. In England, for example, the company was established in the mid-nineteenth century by the Crown for the purposes of undertaking very risky yet potentially successful profit-taking adventures overseas.[41] Although the spirit of entrepreneurial endeavour has remained, much has changed since this time, not least the global environment in which companies now exist and operate.[42]

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[37]"On July 30, 2002, President Bush signed into law the Sarbanes-Oxley Act of 2002, which contains many reforms intended to protect investors by raising corporate governance standards designed to improve the accuracy and reliability of corporate disclosures." Note 33 at 107.

[38]Kirby JM, "Corporate Governance, Corporate Law and Global Forces" in Ramsay IM (ed), *Corporate Governance and the Duties of Company Directors* (Melbourne, Centre for Corporate Law and Securities Regulation, 1997).

[39]This is addressed later and is supported by Justice Owen and the findings of the HIH Royal Commission. Commonwealth, The HIH Royal Commission: The Failure of HIH Insurance *Final Report* (2003).

[40]Farrar supports the approach of seeking a broader understanding of corporate governance, suggesting that "the law seems a blunt instrument to deal with corporate governance … [and] in studying the evolving norms of global corporate governance we must necessarily think new thoughts about the whole subject." Note 23 at 5-6.

[41]Huse M, *Boards, Governance and Value Creation* (New York, Cambridge University Press, 2007) at 50.

[42]Kercher K, "Corporate Social Responsibility: Impact of Globalisation and International Business" (2007) *Corporate Governance eJournal Bond University* at 7.

The essence of entrepreneurial endeavour is also captured at law, where corporations are regarded has having a legal personality.[43] Although there are different forms of corporate entity, ownership and management are fundamentally separate in a company.[44] It is relatively common in most small companies for the directors to be shareholders, with management and control being unified. This may also be the case in larger public companies. However, usually in these cases directors do not have a controlling interest. In larger companies the focus is on the board of directors who have a fiduciary duty to the company.[45]

With a focus on the traditional 'machinery' approach to corporate governance and the advent of major corporate collapses, the role of boards has been highly debated.[46] Given the critical nature of the board this is an understandable response.[47] One major contention surrounding boards relates to the argument for increased director independence.[48] The second, somewhat related contention revolves around the importance of board composition as opposed to board performance.[49]

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[43]For more see Welling B, *Corporate Law in Canada* (Toronto, Butterworths and Co Ltd, 1984). This rule is also set down in the case of *Solomon v Solomon and Co (1897)* AC 33. See also Kelly D and Holmes A, *Principles of Business Law* (London, Cavendish Publishing Limited, 1997).

[44]See Welling Ibid.

[45]See Corkery JF, *Directors Powers and Duties* (Melbourne, Longman Cheshire Pty Limited, 1987). Also Walker LJ, "The Nature of Fiduciary Duty our current notions of how to inhibit abuses of power grew out of Ancient Greek Logic" *On Wall Street* New York 1 December 2002 at 1.

[46]See Harder W, "What's All the Talk about Directors' Ethics?" *Corporate Governance eJournal* Bond University 2006. Vinten G, "The Corporate Governance Lessons of Enron" (2002) Vol 2 No 4 *Corporate Governance* 4-9. Leblanc R and Gillies J, "The Coming Revolution in Corporate Governance" (2003) September/October *Ivey Business Journal* 1-11. Ritchie T, "Independent Directors: Magic Bullet or Band-Aid?" (2007) *Corporate Governance eJournal Bond Univeristy* and Petra ST, "Corporate Governance Reforms: Fact of Fiction?" (2006) Vol 6 No 2 *Corporate Governance* 107-115.

[47]See Young B, "Corporate Governance and Firm Performance: Is there a relationship?" (2003) September/October *Ivey Business Journal*.

[48]See Ritchie T, "Independent Directors: Magic Bullet or Band-Aid?" (2007) *Corporate Governance eJournal Bond Univeristy*

[49]"…increased board formal independence should not be viewed as a panacea for poor corporate performance or board failure." Young B, "Corporate Governance and Firm Performance: Is there a relationship?" (2003) September/October *Ivey Business Journal* at 3. Also, "Nearly two decades of research find little evidence that board independence enhances board effectiveness, Studies have, however, found a negative effect." Westphal JD, 'Second Thoughts on Board Independence: Why do so many demand board independence when it does so little good?" (2002) Sept/Oct *The Corporate Board* 6-10 at 6.

The essence of the argument for board performance also takes the discussion about corporate governance away from 'machinery'-based approaches and towards a more holistic understanding of how decisions are made and the interaction of decision making with corporate power.[50] This discourse notwithstanding, understanding of the 'machinery' of the company helps maintain clarity around the separation of the owners from the managers.

As well as the issues surrounding the separation of the owners and the managers of the company there are two philosophical views of the company. Neither of these views includes an assessment, or understanding, of the dynamics of power that exist within a company. One holds that the company is a shareholder-based entity, while the other posits that the company is comprised of stakeholders.[51] The shareholder-based concept of the company, as first outlined by Professor Berle, suggests that directors are guided solely by profit maximisation for shareholders.[52]

Another theory that has grown out of Berle's shareholder model is that of "contractarianism". Contractarians argue that maximisation of shareholder value is derived by firms focusing on the contractual relations that exist amongst stakeholders. Coase develops this further by arguing for a 'nexus of contracts' that governs trading amongst contracting parties to minimise the costs of market trading.[53] The real question,

[50]"Any explanation of how boards make decisions is missing, and yet this may well be the most important factor in determining the effectiveness of the governance of an enterprise" See Leblanc R and Gillies J. "The Coming Revolution in Corporate Governance" (2003) September/October *Ivey Business Journal* 1-11 at 3.
[51]See Note 23.
[52]Hill J, "Corporate governance and the role of the employee" in Gollan P and Patmore G (eds), *Partnership at Work: The Challenge of Employee Democracy : Labor Essays 2003* (Melbourne, Pluto Press 2003) at 114.
[53]See Coase R, "The Nature of the Firm" (1937) 4 *Economica* 386.

for corporate governance considerations, ought to be: How does this approach to the company affect our understanding of how the company works and, in particular, does it change the dynamics of the decision-makers?

Bavly states:

> Contractarians argue that firms should maximise shareholders' value, while communitarians maintain that there should be a balance between shareholders and stakeholders.[54]

Who determines this balance? How is it derived? On what terms? Communitarians find this difficult to clarify and quantify, which makes their case harder to sustain. Stakeholder theory remains valid in theoretical terms, despite it being more difficult to apply than shareholder theory.[55] Neither theory can explain its approach to, or impact on, the instruments of power or the administration of power within its model of the company. However, each theory would entail very different emphasis for directors' decision-making.

The stakeholder view of the company is espoused by those like Professor Dodd, who disagreed with Berle's notion of the shareholder-centric model of the corporation. Dodd's view is that company directors are "guardians of the interests which the corporation effects and not merely servants of its absentee owners". Therefore, according to Dodd, directors held their fiduciary duties in trust for a broader constituency associated with the organisation and not simply the shareholders.

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[54]Bavly DA, *Corporate Governance and Accountability: What Role for the Regulator, Director and Auditor?* (Connecticut, Quorum Book Westport, 1999) at 117.

[55]This is because shareholder theory is principally about securing returns on investment for shareholders and therefore more easily understood by the financial indicators surrounding the stock price.

Corporate social responsibility (CSR) is a development of stakeholder theory that is particularly pertinent for multinational corporations. The argument for CSR is that corporate accountability and company self-regulation should have as their goal socially responsible business behaviour.[56]

Part of the discussion around CSR includes business ethics, an area that has found many advocates after the large corporate collapses such as Enron and HIH. The collapses have been equated with a loss of business ethics, and thus the solution offered has been to re-establish ethical parameters for business within corporate governance measures. Again, the proponents of business ethics seldom consider the complexities of decision-making within the corporation and how ethics might impact upon it. "Clearly, human greed has not faded from the business scene. Something, however has changed – the public's acceptance of unethical or socially irresponsible behaviour by organisations."[57]

The reality of the modern corporation is that there are often competing interests among stakeholders, requiring management and resolution by the company's leaders. Sims concludes:

> An organisation's social responsibilities are always shaped by the culture and the historical period in which it operates. Just as a society's values, norms and mores change over time, so does the definition of what is socially responsible behaviour.[58]

[56]Sims RR, *Ethics and Corporate Social Responsibility: Why Giants Fall* (Westport CT, Praeger Publishers, 2003) at 43.
[57]Ibid at 39.
[58]Ibid at 44.

One example of this is the change in societal attitudes towards tobacco. Cigarette smoking is increasingly seen as an activity that infringes on the rights of non-smokers to have smoke-free air, rather than an action of choice for individuals to undertake at their will. With this shift has come legal action against tobacco companies from consumers who had purchased their products and used them as intended. What was once legal and socially acceptable is now considered socially irresponsible.

Clearly, companies operate within the prevailing societal context and moral code of the time. Their behaviour will be judged from this framework. Does this mean that social responsibility is fluid? Ethics are relative? If so, who decides at any given time what is appropriate? Theoretically, we are always on the cusp of a shift in societal values, and thus how can people ever be sure they are operating within a specific understanding of the prevailing moral code?

For Socrates, one of the core questions for ethics consideration is "what is arête [traditionally translated as virtue]?"[59] How can we decide this question, or begin to know appropriate considerations for addressing it, if we do not first understand the complexities within, and the context of, the question we are contemplating?

One might assume that simply acting within the law will suffice as a remedy to this situation. However, the law and ethics are not the same. It is possible to act within the law and be unethical at the same time.[60]

[59]See Furley D, *From Aristotle to Augustine* (London, Routledge, 1999) at 110.
[60]Ibid.

Sims gives us one approach to this situation by outlining two principles. One is charity and the other is stewardship.[61]

> To act in a socially responsible way requires organisational leaders to consider the effect of their decisions on the well-being of society; thus managers must ask themselves what their actions do to society and what their actions do for society.[62]

This view highlights the similarities between an ethical approach and CSR considerations for the broader society. In some ways this view might also aid in helping directors maintain a focus on their fiduciary duties to the company.[63]

As outlined earlier, when directors are making decisions for the company they must remain mindful of their fiduciary duties. As Corkery states, "Fiduciary duties of directors are owed to the company. Directors in exercising their powers must act in the company's interest."[64]

Fiduciary duties of the directors to act in the best interests of the company exist regardless of the entrepreneurial nature of the company, or whether it is a stakeholder or shareholder driven entity. This duty has been relied on to ensure appropriate conduct of directors as part of traditional corporate governance measures.

> They can be in breach of this duty even if what they are doing is technically correct and on the face of it within the director's powers.

[61]Note 56 at 47/48.
[62]Note 56 at 66.
[63]This is explored further in Chapter Six.
[64]Note 45 at 59.

> They will not be in breach if the act is beneficial to the company, even though they have not specifically turned their minds to what is in the company's best interests.[65]

It is within this context that it becomes critical to define the company's interest. Who decides, and how? Does the company's interest change depending on which theory one adopts to define what a company is? Moreover, how do we make sense of any of these questions without first understanding the dynamics at work in modern companies? Does power work differently in different companies, thereby requiring directors to act accordingly? How do we understand the impact of fiduciary duty and its interaction with other considerations in directors' decision-making processes? How is this understood with respect to good corporate governance?

What is beneficial to the company? Does this apply in the short run or the long run? Does this also imply that intention on the part of directors is not important in determining their duties? Although it is legal, is it reasonable for directors to make decisions without consideration of the company's best interests, decisions that by chance create a 'benefit' for the company, and not be in breach of their duties?

Within the context of the company's best interests, intentions are important in determining a breach of duty by a director. If directors have a clear intention to commit fraud, or to gain personally at the expense of the company, then they are in breach of their duty to the company. As long as they are acting in accordance with the best

[65]Ibid.

interests of the company, in good faith, they cannot be in breach.[66] Or, if their actions are deemed to be beneficial to the company, they can escape the test of acting in the company's best interests, provided they act honestly.[67] Given these parameters, what is 'best practice' for a director to follow? It is arguably not advisable for a director to walk the thin line of relying on beneficial outcomes. Given this situation, how do we understand the interactions between a director and the company as whole? Does the director hold and exercise power independent of the company, or as an extension of the company's power? Most importantly, how do corporate dynamics interact with and affect the director's ability to adhere to fiduciary duty to the company?

Given that corporate governance sets out the guidelines used by companies to stay true to their visions and comply with external regulations, how does this apply in considerations of corporate governance measures? Does one approach to corporate governance fit all companies? Are external regulations enough?[68] Is corporate governance solely about 'ticking boxes' for procedural purposes or is it an instrument for balancing power? If so, where does the power reside and how does it work? What effect does corporate governance have on the use and existence of power? How better can corporate governance measures be used to aid directors in making decisions in the best interests of the company?

[66]"The Court will interfere when there is a breach of duty, such as fraud or a abuse of power, but it will not substitute its discretion or judgement for that of the directors acting in good faith." Ibid.
[67]"There is a subjective element to this duty, that is, the directors must act bona fide or honestly. There is also an objective element, that is, they must act, in what are the best interests of the company." Ibid at 60.
[68]"Everyone blames too little regulation for the Enron mess, but maybe the culprit was too much. Beyond a certain point complexity is fraud. … when someone creates a system in which you can't tell whether or not you're being fooled, you're being fooled. What Enron was doing, what caused investors to embrace it in a rapture of baffled awe, was hiding debt." Surowiecki J (ed), *Best Business Crime Writing of the Year* (New York, Anchor Books, 2002) at 219.

The core of the debate therefore revolves around the concept of what is in the best interests of the company. What is valued by the company and how are values derived? How do these values interact with directors' decision-making? Is it the same for all stakeholders? Should it be? Who decides what is valuable and how it is accessed or distributed? How does one choose between the same values in separate applications of the company, with regard to the company's best interests?

Rouse sums this up when he states:

> The broader set of attributes that affect perceived values varies substantially from production workers to executives to college professors to performance artists … defining value is more straightforward for stockholders.[69]

Given the relative ease of deriving value for shareholders as opposed to that for stakeholders, the shareholder theory at first glance would suggest a far more straightforward way of determining company interests and the associated fiduciary duties of directors. This assumes that company interests are always associated with profit. Thus, is there an argument that any understanding of power within the company must also include an understanding of the relationship between power and profit?

The shareholder model assumes that value is based on the economic data relating to the stock price. The problem with this approach is that it takes a one-dimensional view of value and therefore the company's best interests are tied solely to this one set of

[69]Rouse WB, *Essential Challenges of Strategic Management* (New York, John Wiley and Sons Inc, 2001) at 61.

indicators. This defines the identity of the company solely by its economic performance. As Barratt states:

> For the vast majority of companies, financial indicators are the only indicators they use to assess corporate health. The problem with financial indicators is that they focus on the past. They tell you nothing about the factors that govern future financial success – customer satisfaction, employee morale, internal cohesion, strategic alliances, innovation, and productivity.[70]

Alternatively, those who support stakeholder theory often cite the concept of the company being socially responsible, arguing that this will in turn create profits. This raises two very important points. Firstly, the social responsibility argument is one of emphasis, i.e. it is not a shareholder theory even though it espouses higher profits. Its fundamental tenet for the company is that it is first and foremost an entity that is intrinsically responsible for and to the larger society within which it exists. Moreover, if a company decides to undertake a specific project under the guise of increasing profits (as its prime objective) but it was seen to be socially responsible to do so, this would still be a shareholder driven objective. Secondly, the concept of social responsibility is problematic from a definitional perspective. As Bavly states, "Social demands have not been fully defined… expectations of corporate responsibility are tricky terrain."[71]

[70]Barrett R, *Liberating the Corporate Soul – Building a Visionary Organisation* (Woburn MA, Butterworth-Heinemann, 1998) at 11.
[71]Note 54 at 116.

Does this therefore mean that because something is not well defined or is not as simple and easy to apply it should be dismissed? Are these two schools of thought mutually exclusive? Is there an alternative? Does it make any difference to understanding how best to manage decision-making for good corporate governance?

Bradley defines the issue for corporate governance as follows:

> The debate … on corporate governance can be distilled to one fundamental issue: whether the corporation should be viewed as a 'nexus of contracts', negotiated among self-interested individuals or as a 'legal entity', with rights and responsibilities as a natural person.[72]

What Bradley fails to explain is why this distinction is important. If we view the company from its own particular power dynamic, why does it matter whether it fits the shareholder or stakeholder theories, is a nexus of contracts or a legal entity as a natural person? In reality, is it fair to say that any company sits solely within one particular model or theory of a company? Rather than looking for an approach that is the panacea, we need to look at what constitutes decision-making within the organisation, how it is administered and how it is affected by different considerations of the company.

> From King John and the Magna Carta at Runnymede to Marie Antoinette and the guillotine in France of 1789, to the aristocrats in the Russian Revolution, to the British in eighteenth century America – the abuse of power by the powerful proved time and time again, in the

[72]Bradley M et al, "The Purpose and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads" (1999) Summer *Law and Contemporary Problems* Vol 62, No 3 at 34.

> long term to be bad for the business of nobility. Philanthropy, fairness, tough but tender strength of will on the other hand, not only keeps the peasants off your back but also gets you a statue in the town square and a favourable mention on the history books. In the long term, it's good for business as well as feeling good to do.[73]

It would be hard to argue that a director's fiduciary duty to serve the best interests of the company could be fulfilled by something that 'felt good to do'. Furthermore, although the first part of Peters' statement may well be true the second part does not necessarily follow as the remedy. The solution to the abuse of power is hardly considerations of philanthropy, 'keeping peasants off your back' or having your statue in the town square. Surely the problem of the abuse of power is solved by the regulation of power via checks and balances; or alternatively, by understanding how the abuse of power is derived and establishing a different approach to corporate governance based on this fresh approach.

This is not to say that corporations should not practise philanthropy; simply that Peters' argument does not necessarily add up. Nor does it show an understanding of corporate decision-making that is helpful in considerations of corporate governance. Corporate governance might do well to move beyond the specifics of the company theory debate.

Clarke aptly puts this point in context, which is particularly pertinent in Vietnam:

[73]Peters J, "Social Responsibility is Free – How Good Capitalism can Co-exist with Corporate Social Responsibility" in Crowther D and Layman-Bacchus L (eds), *Perspectives on Corporate Social Responsibility* (Aldershot, Ashgate Publishing, 2004) at 207.

> The basic architecture of the firm, however, establishes and defines a particular national path dependency in terms of the emergent corporate governance. As a result, the importance of locally based culture, politics and economics remain as vital informants of the unfolding project of 21st century governance.[74]

Moreover, as Pfeffer argues, corporations are inherently political organisations and there is often more than one way to achieve a particular outcome.[75] Furthermore, conflict is a constant companion for decision makers and thus the power within companies is highly fluid.[76]

With a new focus on corporate power, corporate governance is better able to understand and include considerations for decision making rather than being solely limited to the 'machinery' of administration. This allows corporate governance to be more flexible in dealing with the ebb and flow of business.[77] This leads us to contemplate the parallels between sources of power, the custodians of power, and their interaction with decision making within the corporate governance context.

Thus we need to explore the relationships between individuals, the source of power, the instruments of power (machinery) and the external use of regulatory power, if we are to create a comprehensive framework for effective corporate governance models.

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[74]Clarke A, "The Models of the Corporation and the Development of Corporate Governance" (2005) *Corporate Governance eJournal Bond University* at 8.

[75]"It is possible to wield power and influence without necessarily having or using formal authority… developing and exercising power require having both will and skill." Note 18 at 28 and 338.

[76]"When stakeholder demands conflict, a choice between mutually exclusive claims has to be made. In a purely opportunistic strategic analysis, everything ultimately centers on power" Kaptein M and Wempe J, *The Balanced Company A Theory of Corporate Integrity* (Oxford University Press, Oxford, 2002) 213

[77]"The issues raised are multi-faceted, and the public and business interest will only be protected if solutions and amelioration strategies are similarly mutli-dimensional. There are unlikely to be simple solutions…" Vinten G, Note 25 at 9.

To achieve this we need to understand more fully the nature of each company within this context. Only then can we truly understand the role of directors within the corporate governance matrix.

1.8 Structure of the thesis

The thesis covers the directors' powers and duties that exist under Vietnamese corporate law, in twelve chapters.

1.8.1 Chapter One

Chapter One is the introductory chapter for the thesis. It sets the objective of the thesis to provide meaningful insights, recommendations and information for corporate governance decision-makers in Vietnam. It also provides the thesis statement, outlines the research approach, describes key terms, reviews the literature and broad themes in corporate governance and outlines the thesis structure. Chapter One also discusses the research contribution, limitations of the research, summarises the recommendations and suggests possible future research.

1.8.2 Chapter Two

This chapter describes, for the first time, the historical evolution of the current corporate law in Vietnam, touching on influences from the Chinese, French and Russians. It details which pieces of legislation amended or replaced others, using the precise English names of each Act or decree. Chapter Two explores the influence of *Doi Moi* (renovation) on corporate law and provides a timeline of Vietnamese achievements in its evolving corporate law framework and initiatives. It also outlines the influence of the WTO and the OECD Principles on Corporate Governance. Finally,

it explores the legal system, Courts and enforcement that exist in Vietnam today, along with a discussion of the modern context of Vietnamese corporate law.

1.8.3 Chapter Three

This chapter explores definitions of 'director', with specific reference to a number of Vietnamese cases and accompanying analysis of the key areas of distinction between Vietnam and other jurisdictions. Other terms discussed are executive and non-executive director, and managing director. Other key areas that this chapter covers include the roles of the board of directors, inspection committees and the company secretary, and the divisions between the shareholders' meeting and the board of directors.

1.8.4 Chapter Four

The appointment and removal of directors in Vietnam are explored in this chapter. The chapter compares and contrasts the Vietnamese provisions with those in other jurisdictions, with a view to understanding the relative strengths and weaknesses of the Vietnamese provisions. This chapter also reviews provisions for disqualification from office, restrictions on certain persons managing companies, and termination.

1.8.5 Chapter Five

Directors' meetings and the general meeting in Vietnam are analysed in this chapter. The chapter explores the different company types in Vietnam and their respective provisions for these two important meetings. The chapter discusses the potential agency problem that arises in the corporate structure of the Vietnamese limited liability company of two or more members and also explores its similarity with the South

African ‘close corporation’. The chapter concludes with specific recommendations for consideration.

1.8.6 Chapter Six

The fiduciary relationship is outlined in this chapter

1.8.7 Chapter Seven

Chapter Seven discusses the directors’ duty to act honestly and in the best interests of the company in Vietnam. It explores the provisions set out in the Vietnamese *Law on Enterprises 2005* and the *Model Charter*. The chapter then analyses these provisions in contrast to s 181 of the Australian *Corporations Act 2001* and a number of leading Australian cases, including *ASIC v Adler*. The proper purpose doctrine is also outlined, along with the complexities associated with nominee directors, directors of wholly-owned subsidiaries, and group companies. Finally, the chapter explores the duty not to fetter discretion, creditors, and equitable relief.

1.8.8 Chapter Eight

Conflicts of interest for directors in Vietnam are analysed in this chapter. It outlines the Vietnamese provisions that relate to directors contracting with their own company and compares and contrasts them with similar provisions in other jurisdictions. The chapter further discusses self-dealing and secret profits. Finally, it defines a material interest and concludes that the Vietnamese provisions lack detail compared to the equivalent Australian measures, which leads to a weaker governance framework.

1.8.9 Chapter Nine

The directors' duties of care, skill and diligence in Vietnam are the subject of this chapter. It takes particular interest in the *Law on State Owned Enterprises 2003* and argues that reference to a duty to the 'State' could be a useful platform from which Vietnam could consider a codified duty to social responsibility similar to s 172 in the *UK Companies Act 2006.* This would be a groundbreaking advance for Vietnam, placing it as a leader in the Asian region in this area of corporate law. In this context corporate social responsibility is discussed in detail. The *Tuong An Vegetable Oil* case is used to highlight some of the difficulties faced in Vietnam where directors have divided loyalties in certain situations. This chapter also discusses the tests associated with the duty of care in Australia. Finally, diligence and the business judgement rule are explored with reference to Chinese corporate law. The chapter concludes that Vietnam has the core ingredients to cease 'borrowing' its law and to focus more on 'evolving' its own good governance.

1.8.10 Chapter Ten

This chapter relates to the directors' financial relationship with the company in Vietnam. The chapter outlines the various laws that pertain to directors' remuneration, directors' and service contracts, and loans to directors. The chapter concludes that the provisions in Vietnam are not as robust as good governance would require. In particular, more shareholder protections need to be considered to improve the existing provisions in this area of the law.

1.8.11 Chapter Eleven

Remedies and enforcement of directors in Vietnam are explored in this chapter. Provisions for minority shareholders are also considered. Other concepts and areas

covered include oppression, the proper plaintiff, statutory derivative action and the internal management rule. A number of improvements are suggested.

1.8.12 Chapter Twelve

This chapter concludes the thesis and outlines the general and specific recommendations.

1.9 Key concepts and terminology

1.9. 1 The company

The company has three distinct elements or characteristics at law. They include the company itself as a separate legal entity (or person), the directors, and the shareholders (or members). Hansmann and Kraakman outline a company as follows:

> Business corporations have a fundamentally similar set of legal characteristics – and face a fundamentally similar set of legal problems – in all jurisdictions… the five core structural characteristics of the business corporation are: (1) legal personality, (2) limited liability, (3) transferable shares, (4) centralized management under a board structure, and (5) shared ownership by contributors of capital.[78]

[78]Kraakman R, Davies P, Hansmann H, Hertig G, Hopt K, Kanda H and Rock E, *The Anatomy of Corporate Law* (Oxford University Press, 2004) at 1 and 5.

The constitution (or charter) of the company outlines how the three elements interact and the various rules, powers and responsibilities attributable to the directors and shareholders, in particular.

Companies can adopt a number of different forms, including private, public, limited by shares, limited by guarantee, and unlimited liability.

1.9.2 *Salomon v Salomon*

This case confirmed what the statutes had been pronouncing, that the company was a separate legal entity.[79] As a result, in broad terms, notwithstanding particular circumstances to the contrary (such as insolvency), Courts cannot look beyond the 'corporate veil' to make individuals liable for company debts.[80]

1.9.3 Limited liability

Liability in this context refers mainly to debts incurred by the company. Limited liability means that the debts incurred by a company cannot be recovered from the owners, employees or individuals who are involved with the company. The primary attraction for limited liability companies is to defray risk for shareholders who invest their funds with the company, in the hope of a return on their investment. They are made more comfortable in taking the risk of their investment, knowing that if the company fails to perform as expected they will not be held liable for any ensuing outstanding debts. Limited liability companies are the most common form of company.[81]

[79] *Salomon v Salomon and Co* [1897] AC 22.
[80] For more see Moore M, "A Temple Built on Faulty Foundations: Piercing the Corporate Veil and the Legacy of Salomon v Salomon" (2006) March *Journal of Business Law* 180-203.
[81] "Today limited liability has become a nearly universal feature of the corporate form. This evolution indicates strongly the value of limited liability as a contracting tool and financing device." Kraakman R,

1.9.4 Legal personality

At incorporation,[82] a company becomes, in legal terms, a separate entity or 'person'.[83] As an economic entity, a corporation is often referred to as a 'nexus of contracts', with each company enjoying its own specific set of relationships.[84] The uniqueness of each company gives it the semblance of a personality.[85]

Legal personality is specifically referred to within the Vietnamese company legal framework. Article 84 of the *Civil Code 2005* states:

> An organization shall be recognized as a legal person when it meets all the following conditions: 1. Being established lawfully; 2. Having a well-organized structure; 3. Possessing property independent from that of individuals and other organizations, and bearing its own liability with such property; 4. Independently entering into legal

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Davies P, Hansmann H, Hertig G, Hopt K, Kanda H and Rock E, *The Anatomy of Corporate Law* (Oxford University Press, 2004) at 9.

[82]"Incorporation begets a new person." Welling B, *Corporate Law in Canada* (Toronto, Butterworths and Co Ltd, 1984) at 84.

[83]"In English legal history recognition of the legal personality of certain corporations preceded the recognition of limited liability on the part of owners. However, it is the combination of these features in virtually every modern company which is the distinguishing feature of that institution, from a practical and theoretical perspective." Rickett CF and Grantham RB, *Corporate Personality in the 20th Century* (Hart Publishing, 1998) at 12.

[84]"The basic proposition of corporate personality is simple enough. Corporate rights and obligations are, so far as possible, to be analyzed by analogy to the rights and obligations of human beings. This is really no different form saying that a child's rights and liabilities are, to the extent possible, to be analyzed by analogy to the rights and obligations of adults." Note 82 at 112.

[85]This approach has been a fundamental part of corporate law for a considerable time. "The separate legal entity principle firmly established by *Salomon v A Salomon & Co Ltd* [1897] AC 22 (Salomon's Case has been applied on countless occasions in Australia including in the High Court decisions in *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567; 52 ALJR 89; 17 ALR 575; 3 ACLR 89 and most recently in *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424; 78 ALJR 907; 206 ALR 387: [2004] HCA 28. The creation of a separate legal entity has a number of consequences including; the ability of owners, managers and employees to be represented by the same person but in different capacities in relation to the company…the company's property is not owned by the shareholders; and the duties owed by the company to third parties (eg the duty to provide a safe system of work for employees) are separate and distinct from the duties owed by directors to the company, even where the director's primary responsibility is to carry out the company's activities on its behalf." Baxt R and Harris J, *Corporations Legislation 2008* (Sydney, Thomson Legal and Regulatory, 2008) at 111.

relations in its own name.[86]

Another example can be found with a typical certificate of investment which states at Article 1;

> The enterprise shall enjoy full legal personality [and] have its own seal…[87]

Corporate personality and limited liability together form a vitally important and robust tool to deliver economic growth that in turn creates social prosperity.[88] This combination of legal concepts allows capital flows for business ventures from multiple investors, while limiting transfers costs of the venture's assets when participants in the venture change. Most importantly, it limits the recourse of action against the investors to the value of their contribution.

1.9.5 Agency

[86]See National Assembly, Socialist Republic of Vietnam *Civil Code 2005*.

[87]Article 36 of the *Law on Enterprises 2005* refers to the seal of enterprises. "(1) An enterprise shall have its own seal. The seal of an enterprise of an enterprise must be retained and preserved at the head office of such enterprise. The form and content of the seal, the conditions for having a seal and the usage of the seal shall be in accordance with the regulations of the Government. (2) A seal is an asset of an enterprise. The legal representative of an enterprise must be responsible for the management and use of the seal in accordance with law. Where necessary and upon agreement of the seal issuing body, an enterprise may have a second seal." See National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005.* In Australia a company is not required to have a seal but may choose to have one. "Traditionally a company 'executed' or signed deeds and other important documents, such as share certificates, 'under seal'. The seal is a little machine for impressing the company's name onto a red wax seal, which was attached to the document, and sometimes 'sealing up' the document from prying eyes. Two directors or one director and the secretary would sign as witnesses to the seal. Today a typical company seal has the company name around the circumference and the company number across the centre." Corkery JF and Welling B, *Principles of Corporate Law* (Scribblers Publishing, 2008) at 97.

[88]"The institution of the company, and the legal and administrative edifice that supports it, can be justified only by the economic benefits it creates. Absent those benefits, the institution's rationale is exhausted." Rickett CF and Grantham RB, *Corporate Personality in the 20th Century* (Hart Publishing, 1998) at 17.

Because there is a separation between ownership (shareholders) and control (directors) within the company there exists the potential for self-interest to motivate decisions by individuals. The shareholders (principals) rely on the directors (agents) to act in their best interests, despite the temptation, and capacity, for the directors to make decisions in their own interest while ignoring the interests of the shareholders.

> Since the basis of agency theory is the self-interested utility-maximizing motivation of individual actors, it is assumed that the relationship between shareholders ('principals') and managers ('agents') will be problematic: how is the 'principal' able to prevent the 'agent' from maximising his own utility?[89]

Within the corporation there are three main agency problems. The first, as already outlined, exists between directors and shareholders. The second exists between shareholders and the third between shareholders and other parties such as employees.[90]

1.9.6 Fiduciary duties

Because the company is a separate legal entity with a personality of its own, and the owners of the company (the principals) trust the directors (agents) to make decisions that are in the best interests of the company, there is a special relationship which the directors must respect. This relationship is based on trust, and as a result the directors

[89]Clarke T (ed), *Theories of Corporate Governance* (Routledge, 2004) at 5.

[90]"Three generic agency problems arise in business firms. The first involves the conflict between the firm's owners and its hired managers. Here the owners are the principals and the managers are the agents. The problem lies in assuring the managers are responsive to the owner's interests rather than simply to the managers' own personal interests. The second agency problem involves the conflict between, on the one hand, owners who possess the majority or controlling interest in the firm and, on the other hand, the minority or noncontrolling owners. Here the noncontrolling owners are the principals and the controlling owners are the agents, and the difficulty lies in assuring that the former are not expropriated by the latter. The third agency problem involves the conflict between the firm itself (including, particularly, its owners) and the other parties with whom the firm contracts, such as creditors, employees, and customers." Note 78 at 22.

must act accordingly; that is, they must make decisions that benefit the company and not themselves. The company relies on the directors to make decisions that consider its short-, medium- and long-term best interests, and ensure its continued wellbeing.

The directors have fiduciary duties to the company as consequence of their relationship.

1.9.7 The shareholder

A shareholder is someone who holds a share certificate for a share in the company. Shareholders are the owners of the company. Different companies have different agreements with the shareholders and the role of a shareholder can vary depending on the provisions outlined by the company.

The classification of the company also affects the shareholders. For example, a private company (or closely held company) usually has fewer shareholders than a public (listed or widely held) company, where stock (shares) in the company are traded on the relevant stock exchange. The shareholders (or members) of a private company are often involved in running the business, whereas shareholders of listed companies generally own proportionately smaller shareholdings in the company and are not involved in its day-to-day management. However, although shareholders of listed companies are usually not as involved in the business as private company shareholders, the broad legal concepts and rules governing the relationship between shareholders and the company are practically the same.

Shares can be held for an unspecified time. It is possible to buy and sell shares in a

listed company on the same day. Private company shareholdings are usually owned by a few people, often family, who hold them for extended periods of time. Sometimes the shareholdings in private companies are tied to those who are participating in the business, and there may be stipulated agreements in the shareholder's agreement specifying how the shareholding can be sold. Shares in listed companies do not require these understandings and they are freely traded on the relevant stock exchange.

Because shareholding involves risk, shareholders, especially those in listed companies, need to be well informed about the company in which they seek to purchase shares. Prospective shareholders need to understand the dynamics of the stock market and ascertain the risks involved in their shareholding.

In Australia, shareholders decide, by way of vote, the composition of the board of directors. They also determine the company's constitution, which outlines the various responsibilities of running the company. Although shareholders are the owners of the company and retain specific powers of authority, they most often leave management of the company to the directors, the 'agents' as they are called in agency theory, who are usually qualified corporate executives.

The shareholders in private companies usually have long-term interests in the company and are far more likely to be directors as well. This presents a possible conflict of interest, especially with the increased likelihood of family involvement in management of the company. Potential conflicts of interest also arise with directors of public companies but are less likely to relate to family ties.

In either form of company, public or private, conflicts of interest can arise when either major shareholders or directors treat the company as their own, or their 'alter ego', rather than understanding and respecting the company as a separate entity to which they owe duties of the highest order – fiduciary duties. Companies are inefficient and will ultimately fail if their agents do not render loyal service and act with care and skill. Deceiving or disloyal agents, especially directors, might distribute corporate profits to themselves and otherwise undermine, betray or steal from the company – failing in their fiduciary duties and killing off the company.

1.9.8 The directors

As stated, shareholders trust their companies to the management of directors. The board of directors, in turn, oversees the day to day running of the company by senior management.

In private companies, directors are often major shareholders and salaried managers. Public companies, however, are more likely to have a more diverse board of directors: some may be salaried employees (executive directors), and others non-executive directors. Public company directors may be shareholders, but are most likely to have smaller shareholdings in relative terms to their private company counterparts.

Directors fall into two broad types, executive and non-executive. The number of directors on the board and the ratio of non-executive and executive directors vary with each company. An ongoing debate in corporate governance relates to independent directors. The argument goes that if a director who is 'independent' (that is an 'outside' or non-executive director, who has no financial interest in the company) will protect the interests of shareholders better and improve company performance as a result. The

inclusion of independent directors has been popular and some jurisdictions stipulate that a specific number or percentage of the board must be independent directors. This is done in an attempt to promote good corporate governance. The counter argument is that there is little or no evidence that independent directors improve performance. Moreover, some suggest and insist that directors be also shareholders, to ensure that they serve the interests of shareholders.[91]

1.9.9 The managers

Managers of companies oversee the administration and organisation of the daily activities of the company's business activities. They ensure that the appropriate decisions are made so that the company both in the present and for the future maximises its profits. Many managers are specialist in their chosen field and work on particular aspects of the business requirements such as marketing, accounting, legal or strategic development. Managers are usually ultimately accountable to the managing director (or chief executive officer, CEO) who in turn reports to the board of directors.

Managers are usually contracted to the company for their services, with their employment contract outlining the various responsibilities required in the position. Sometimes these contracts can include incentives that aid in ensuring that the manager performs. Incentives can include bonuses, shares, options to shares or other similar inducements. Often the biggest incentives are attached to roles that carry the biggest risks, and where performance is critical for the success of the business.

1.9.10 The creditors

[91]For more see Shan J and Zhang S, "An Empirical Analysis of Independent Directorship and Corporate Performance in China" in Tomasic R (ed), *Corporate Governance: Challenges for China* (China, Law Press, 2005). Also Ritchie T, "Independent Directors: Magic Bullet or Band-Aid?" (2007) *Corporate Governance eJournal Bond University at <http://epublications.bond.edu.au/cgej/5/>*.

There is a growing discussion around directors' duties to creditors.[92] Creditors come in different forms and include both individuals and corporations. There are three main types of creditor: trade creditors, institutional lenders (most often banks) and company certified creditors (usually transacted via the issue of a company debenture).

Each creditor and debt instrument has particular terms and obligations for the company to meet in order to repay the debt incurred. Creditors face the risk of not being repaid if the company is unable to meet its repayments. In an attempt to defray this risk some creditors may insist on some form of security from the company.

1.10 Vietnamese company structures

The *Law on Enterprises 2005* comprises laws for the following types of company: Limited liability companies outlined in two sections (Limited liability companies with two or more members and One member limited liability companies), shareholding companies, partnerships, private enterprises and corporate groups.

The different company types enjoy different provisions, specific to their purpose. Throughout this thesis mention is made, where appropriate, of each of the main company structures, when discussing their respective provisions. Diagrams illustrating the various structures are provided in Appendix A.

1.11 Research contribution

This is the first study of its kind to review and analyse the provisions set out in Vietnamese corporate law for directors' duties. This research will provide a platform

[92]For more see Anderson H, "Directors' Personal Liability To Creditors: Theory Versus Tradition" (2003) Vol 8 No 2 *Deakin Law Review* 209.

for further research in the field and a reliable base for educating Vietnamese directors and other interested parties about this area of Vietnamese law.

Important recommendations are made in this thesis, with the view of improving corporate governance in Vietnam to further assist in legal and economic development. Most of the recommendations have already formed part of a submission to the World Bank corporate governance program in Vietnam.[93] This program is one part of the current Vietnamese initiatives in corporate governance and corporate social responsibility reform.[94]

1.12 Recommendations

Both general and specific recommendations for further consideration by corporate governance decision makers are provided in the conclusion.

1.13 Limitations

This thesis has had to rely on reputable English translations of Vietnamese laws and legal publications, and they have been accepted at face value despite at times appearing to have strained meaning in English. Where appropriate the translations have been included in the appendices.

One challenging feature generated by the language barrier is obtaining reliable and detailed information. This is particularly difficult when trying to find cases or Court decisions in a system that does not report cases and is often wary of 'foreigners' wanting to understand the law. Although these challenges have presented limitations,

[93]For more see http://www.ifc.org/ifcext/mekongpsdf.nsf/Content/Programs.
[94]See http://www.undp.org.vn/detail/newsroom/news-details/?contentId=2875&languageId=1.

the help of some diligent translators has been invaluable and greatly appreciated. Despite extensive efforts to ensure that all facts presented are true and correct, given the obstacles involved it is fair to assume that further amendments will be required.

1.14 Future Research

As Vietnam continues to evolve, economically and legally, and information becomes more freely available, studies such as this will become easier. Research into the relative performance of different corporate structures and their respective governance measures could be useful in helping to determine the most appropriate structure to use in a given circumstance. Finally, research into the relationship between the “law matters” thesis, the OECD principles and culturally specific performance would further assist emerging economies like Vietnam in their corporate governance decision making.

Chapter Two

The Evolution of Vietnamese Corporate Law

2.1 Introduction

Modern Vietnamese corporate law can only be understood with an appreciation of the historical influences that have impacted upon it. Chinese and French occupations of Vietnam, along with Russian socialist legal doctrine, have made significant contributions to shaping Vietnamese corporate law in its infancy. Arguably the most significant impact has been from the introduction of *doi moi* – the 'renovation' of the Vietnamese economy. The natural progression of this change has seen the recent impact of Vietnam's acceptance into the World Trade Organization (WTO).

2.2 Chinese influence

The early part of Vietnamese history is dominated by a thousand years of Chinese occupation.[1] This period left two lasting legacies. One was the legacy of Confucianism and the second was an enduring tension with China.[2] Between the 10th and the 19th centuries (the feudal period) various laws were used by Vietnamese kings to govern, but none of these related to commercial law, despite some trade existing within villages.[3] China continued to influence Vietnam in different ways after its occupation ended.[4] China also experienced similar reform processes as it developed.[5]

[1]For more on the history of China and Chinese law see Tay A, "People's Republic of China" in Tan PL (ed), *Asian Legal Systems* (Sydney, Butterworths, 1997). See also Zhao X, "Company Law Reform in China: Its Basic Aims and Values" in Tomasic R (ed), *Corporate Governance: Challenges for China* (China Law Press, 2005).

[2]"… and in modern times Vietnam has engaged in recurrent battles to resist Chinese rule…Confucianism and its structures were well-established prior to colonial rule, as well as pre-colonial economic and political order" Sidel M, "Vietnam: The Ambiguities of State-Directed Legal Reform" in Tan PL (ed), *Asian Legal Systems* (Butterworths, 1997) at 356.

[3]"In the villages, where most people lived, commerce revolved around personal relational networks backed by moral authority of village and clan heads: Confucianism's 'superior men' (*quan tu*)… The situational validity (thoa dang) of village rules and rituals produced commercial practices that were too contextualized and fragmented to form the basis of universal commercial norms." Gillespie J, "Importing

2.3 French influence

The feudal period ended with the French occupation in the late 19th century. The French created three distinct territories within Vietnam, each with its own legal system. The territories were:

The North (Tonkin) - partly protectorate and partly colonial,

The Centre (Annam) – French protectorate,

The South (Cochin-China), which also included three 'ceded' cities of Ha Noi, Hai Phong and Da Nang – considered French.

The French were responsible for establishing the first corporate forms and establishing company law in Vietnam. The first provisions set out by the French for Vietnamese company law were embodied in *North Civil Code 1931* and the *Central Vietnam Commercial Code 1942*. These codes borrowed from French company models and provided for two company structures, human associations and capital associations.[6]

Law Reform: Vietnamese Company Law as a Case Study" in Macmillan F (ed), *International Corporate Law Annual* (Hart Publishing, 2003) at 189-190.

[4]See Sidel M, *Law and Society in Vietnam* (Cambridge University Press, 2008).

[5]"Vietnam's reforms largely parallel China's but with some differences…main differences from China included involvement in Indochina wars, the need to merge the quite different North and South Vietnam, and much dependence on East bloc aid and trade. Even in the North, Vietnamese 'war communism' was more a system for distributing East bloc aid than a system for coordinating internal production. A functioning peacetime socialist economy had not been consolidated in the North before it tried to absorb the capitalist South, which helped precipitate economic transition. Relative to the Soviet model, Vietnam shared several characteristics with China, but even more so: a still more agricultural economy, a still later communist revolution, a still shorter period of agricultural collectivization, a still less socialist industry, and still more decentralized industry. These facilitated a still faster response to economic liberalization…" Winckler EA, *Transition from Communism in China* (Lynne Rienner Publishers Inc, 1999) at 243-244.

[6]See Mesnooh CJ, *Law and Business in France* (Martinus Nijhoff Publishers, 1994).

The French company laws were retained after independence in 1945.[7]

It is helpful to understand some of the historical developments within Vietnamese society. The dominant theme that recurs throughout any investigation into Vietnamese history is the desire to be Vietnamese. This desire is particularly apparent when coupled with the need to avoid and resist colonial rule.

> From the perspective of Vietnamese history, the arrival of international communism was an incidental result of a long and conscious search for foreign assistance and training to overcome colonial rule. This quest had begun late in the nineteenth century. Some mandarins in the beleaguered Nguyen monarchy sought military aid from China in the hope of overcoming French aggression… For young Vietnamese the Confucian traditional order was bankrupt and could no longer serve as a guide for future development; yet to acquiesce in the new order imposed by the French – as most Vietnamese eventually did – would mean the permanent loss of Vietnamese sovereignty. In this general disorientation and frustration, young Vietnamese who earlier would have prepared themselves for positions of leadership in the mandarinate were ready to accept a new anticolonial ideology, *any* anticolonial ideology that was unconnected with the past and the values of colonialism. This was the intellectual

[7] *Decree No 47/SL* dated 10 October 1945 provided for the temporary implementation of the former French laws and those of the Nguyen Dynasty if they did not oppose the independence of the newly formed Democratic Republic of Vietnam established on 2 September 1945, with President Ho Chi Minh.

and political environment of the country when Marxism-Leninism was transplanted in Vietnam.[8]

In July 1954 the Geneva Agreement for Peace in Indochina was signed and Vietnam was subsequently divided into North and South on either side of the 17th parallel.[9] This division remained for 21 years and was the precursor to the Vietnam War.[10]

As a result of the North/South divide, different legal provisions existed in each region. As the North was governed by the Labour Party of Vietnam, as a single party state, it presided over a state-run economy which was predominantly driven by State-owned enterprises devoid of market influences. As a result the company as such did not exist in the North during this period.

The South, in contrast to the North, developed a market economy. The French company law that had been enacted prior to 1945 remained in force until the introduction of the *Commercial Code* in 1972. The *Commercial Code* provided for five types of business association, of which four of were corporate forms:

1) Partnerships
2) Simple share capital associations
3) Joint capital associations
4) Limited liability associations
5) Shareholding associations[11]

[8]Khanh HK, *Vietnamese Communism 1925-1945* (Cornell University Press, 1982) at 53-54.
[9]See Note 3.
[10]Ibid.

After the end of the Vietnam War in 1975 the North's state-driven economy took over and the *Commercial Code 1972* of the South was abolished. The Communist Party was the sole party in Vietnam and led the economy without private economic entities or a market economy. Pre-existing private enterprises in the South were nationalised and became state-owned.[12]

2.4 Soviet influence

As French rule subsided and communist ideology gained more influence, Vietnam borrowed and adapted party-dominated legal structures from the Soviet Union.[13] These structures, like those of the Chinese, concentrated heavily on maintaining party dominance.[14] The role of law was, therefore, always subordinate to the rule of the party. Confucianism also played a role in the thinking that established the legal frameworks that placed the party first. As Sidel explains:

> The party was presumed to represent virtue (now expressed in political terms) and to serve as judge of when citizens gained that virtue, and was thus acknowledged as the sole grantor of privileges and rights.[15]

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[11]*Commercial Code 1972*. For more on this see Vu Van Mau, *Lectures of Law*, Vol 1 (Phap luat dien giang) (1973) 36-7.
[12]See The World Bank, *Vietnam Business: Vietnam Development Report* 2006.
[13]Vietnam relied heavily on the Soviets for other assistance, as Winckler states: "In *Vietnam* during the 1980s Soviet aid grants and trade subsidies constituted 10-20 percent of GNP and provided most of state investment and state enterprise profits. Termination of Soviet help forced drastic restructuring of state enterprise, while U.S. hostility prevented Western aid." See Note 4 at 239.
[14]"Since the early 1950s, the Vietnamese Communist Party has sought to curtail the public sphere in Vietnam in order to impose a proletarian dictatorship and build socialism. Embracing "Marxism-Leninism with Ho Chi Minh Thought" the Party has historically shown little tolerance for civil society." Landau I, "Law and Civil Society in Cambodia and Vietnam: A Gramscian Perspective" (2008) Vol 38 No 2 May *Journal of Contemporary Asia* 244-258 at 250.
[15]Sidel M, "Vietnam: The Ambiguities of State-Directed Legal Reform" in Tan PL (ed), *Asian Legal Systems* (Sydney, Butterworths, 1997) at 361-62.

The socialism of the Soviet Union, and Chinese legal theories of a dominant party role, combined with the historical Confucian traditions, place the Vietnamese State as both enforcer of the law and embodiment of virtue. This puts the strength and role of the party beyond reproach, both legally and morally.[16]

2.5 Doi moi (renovation)

Prior to *doi moi* in December 1986, the concept of corporate law or corporate governance was anathema to Vietnamese business. This was particularly evident in the provision of legal training.[17] Each company worked solely for the government. The government stipulated who would produce any given product, the supplier of the materials and the destination of the end product, specifying the price. In short, there was simply no need or requirement for corporate law. As a result Vietnam has a

[16]"[the] law and the legal system represented and served to strengthen the virtuous, controlling, punitive and redemptive role of the state. In each of these systems, rights, to the degree that they were recognised, were granted by the state. Fundamental rights were not recognised in reality, even if they were sometimes put on paper." Ibid at 362.

[17]Prior to the union of North and South Vietnam there were two separate legal systems involving different legal training. The Hanoi Legal University was set up on 10/11/1979 according to Decision No 405/QD-CP of the Government Committee. On 6/7/1993 under Decision No 368/QD-TC the name of the school was changed to Hanoi Law University belonging to the Ministry of Justice and managed by the Ministry of Education. In the south of Vietnam the evolution of legal education was different. In 1982 the legal secondary school of Ho Chi Minh was established according to Decision No 199-QD/DT dated 16/10/1982 of the Minister of Justice. This school trained persons at intermediate level of legal training. From 1983 until 1988 this school co-operated with the Hanoi Legal University to establish legal classes at university level. In 1987 the Ho Chi Minh branch of the Legal University belonging to the Ministry of Justice was formed according to Decision No 357-CT dated 25/12/1987 of the Chairman of Minister's Committee. This school co-operated with the Hanoi Legal University to train people at university level in the south of Vietnam. On 6/7/1993 the Minister of Justice changed the name of the Ho Chi Minh branch of the Legal University into the Ho Chi Minh branch of the University of Law according to Decision No 368/QD-TC of the Minister. On 30/3/1996 the Minister of the Ministry of Justice passed Decision No1234/GD&DT to set up the Law University belonging to the National University. This school was set up on the basis of the Ho Chi Minh Branch of the University of Law and the Law faculty of the General University of Ho Chi Minh. On 10/10/2000 the Prime Minister issued Decision No 118/2000/QD-TTg to separate the Law University belonging to the National University of Ho Chi Minh and forming the Ho Chi Minh University of Law as an independent university. Today, there are two degrees in law accepted by the Government, the original one from the National University and the new one at the Law University.

fledgling corporate sector and a correspondingly undeveloped corporate governance regime.[18]

Some of the major milestones Vietnam has achieved since *doi moi* include:

1994 Vietnam lifts the US embargo

1994 Vietnam submits application to General Agreement on Tariffs and Trade (GATT) in June.

1995 Vietnam joins ASEAN on July 28.

1995 Vietnam application for WTO membership accepted in January (negotiations started in July 1998).

1996 Vietnam is a founding member of ASEM.

1997 Vietnam hosts the Francophonie Summit in Hanoi on November 17.

1998 Vietnam joins APEC.

2001 Vietnam and USA conclude a Bilateral Trade Agreement on December 10 (Ratified by the US Congress on October 3, 2001 and approved by the National Assembly in Vietnam in November 2001).[19]

2004 Vietnam hosts Fifth Asia-Europe Meeting (ASEM 5) in Hanoi on October 8-9.

2006 Vietnam hosts the APEC summit in Hanoi from November 16-19.

2007 Vietnam joins the WTO on January 11.

[18]Prior to 1986 Vietnam was a state dominated socialist economy. After 1986 the state began to implement the 'renovation' agenda (*doi moi*) which heralded the beginning of the privatisation of State owned enterprises. For more see Lockhart G, "Vietnam: Social Order and Business Culture in the Age of Globalisation" in Sampford C, Condlln S, Palmer M, and Round T (eds), *Asia Pacific Governance: From Crisis to Reform* (Ashgate Publishing Co, 2002).

[19]This was a significant step in the process of Vietnam's accession into the World Trade Organization (WTO) as it was the last of the bilateral agreements Vietnam needed to conclude in its 11 year process of joining the WTO. For more see Manyin ME, Cooper WH and Gelb BA, "Vietnam PNTR Status and WTO Accession: Issues and Implications for the United States" *CRS Report for Congress* (October 2006).

After 1986 a number of laws were enacted in the area of corporate law. They included:

The Law on Foreign Investment in Vietnam 1987[20]

The Company Law 1990[21]

The Private Enterprise Law 1990

The Law on Encouragement of Domestic Investment 1994[22]

The State-Owned Enterprises Law 1995[23]

The Law on Cooperatives 1996[24]

Law on Foreign Investment in Vietnam 1996[25]

Law on Securities 2006.

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[20]This Law was amended by the *Law on amendment supplement of some provisions of the Law on Foreign Investment in Vietnam* on 30 June 1990 and again on 23 December 1992. The *Law on Foreign Investment in Vietnam* in each of these amended forms did not include any real corporate governance regulations. Following this law was the *Ordinance on Economic Contract 1989* which formed part of the initial internal economic reforms after Doi Moi.

[21]On 21 December 1990 the National Assembly passed a *Law on Companies* which came into force on 15 April 1991. The law was drafted with assistance from French legal advisers. "Borrowing from the French *société anonyme*, the [Law on Companies] introduced shareholding companies (Cong ty co phan) and limited liability companies (*société a Responsabilite Limitee*) or in Vietnamese *cony ty trach nhiem luu han*) to Vietnam." Gillespie J, "Importing Law Reform: Vietnamese Company Law as a Case Study" in Macmilllan F(ed), *International Corporate Law Annual* (Hart Publishing, 2003) Also, Freeman NJ, "Promoting Good Corporate Governance Practices in Vietnam" in Ho KL (ed), *Reforming Corporate Governance in Southeast Asia* (ISEAS publications, 2005). As a background to French company law Mesnooh states: "The five forms of commercial companies treated by the 1966 Law are – the *societe anonyme* (the "SA"), which is the French law equivalent of a corporation; – the *societe a responsabilite limitee* (the "SARL"), which possesses many of the characteristics of an SA but is more suited for small- and medium- sized undertakings; – the *societe en nom collectif* (the "SNC"), which is the equivalent of a general partnership; – the *societe en commandite par actions* (the "SCA"), which is the equivalent of a limited share partnership; and – the *societe en commandite simple* (the "SCS"), which is the equivalent of a limited partnership." Note 5 at 32-3.

[22]This law was replaced by the *Law on Encouragement of Domestic Investment (amendment) dated 20 May 1998* in 1999. However, *The Law on Encouragement of Domestic Investment (amendment) 1998* has been invalid since 2006.

[23]This law was enacted on 20 April 1995 and replaced by the *Law on State-Owned Enterprises Law No 14/2003/QH11 dated 26 November 2003* in 2004. This *Law on State-Owned Enterprises Law No 14/2003/QH11* will be totally replaced by the *Law on Enterprises 2005* in 1 July 2010 as per Article 166 of the *Law on Enterprises 2005*.

[24]This Law was replaced by the *Law on Cooperatives No. 18/2003/QH11 dated 26 November 2003* in 2004. This Law is still valid.

[25]This Law replaced the *Law on Foreign Investment in Vietnam 1987* and its amendments of 1990 and 1992 as outlined above. The 1996 version of this law was then amended by the *Law on amendment supplement of some provisions of the Law on Foreign Investment in Vietnam No. 18/2000/QH10 dated June 2000 in 2000*. Finally the 1996 version and the 2000 amendment of this law was, in turn, replaced by the *Law on Investment 2005.* Some provisions related to corporate governance were included in this law. They include auditing and disclosure of annual financial statements and decision processes for Boards of Directors and senior management. For more see Freeman Note 18. Also Magennis W and Hai NT, *Law in Vietnam* (The Law Printer, 1992) and Phillips Fox Lawyers, *Circular 215-UB-LXT On Guidelines for Foreign Direct Investment Activities in Vietnam* (Melbourne, The Law Printer, 1994)

In 1999 the *Law on Enterprises 1999* (No.13/1999/QH10 dated 12 June 1999) was passed to replace the *Company Law 1990* and the *Private Enterprise Law 1990.* The *Law on Enterprises 1999* retained the corporate structures established under the *Company Law 1990*[26] and allowed for the creation of two further corporate entities. The *Law on Enterprises 1999* provided for the following corporate structures:

1) Limited liability companies (including limited liability companies with two or more members and one-organisation-owned limited liability companies);[27]
2) Shareholding companies;[28]
3) Private enterprises,[29] and
4) Partnerships.[30]

[26] The *Company Law 1990* provided for two corporate structures, namely limited liability companies and shareholding companies.

[27]Articles 26 to 50 cover the provisions for these companies in the *Law on Enterprises 1999*. Article 26 (1) defines a limited liability company as an enterprise in which [should some parts of this be in quotes?](a) A member shall be liable for the debts and other property obligations of the enterprise within the amount of capital that it has undertaken to contribute to the enterprise; (b) The capital contribution of each member may only be assigned in accordance with article 32 of this law; (c) A member may be an organisation or an individual; the number of members shall not exceed fifty (50). (2) A limited liability company may not issue shares. (3) A limited liability company shall have legal entity status from the date of issuance of the business registration certificate. See National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 1999.*

[28]Articles 51 to 94 of the *Law on Enterprises 1999* are the provisions for shareholding companies. Article 51(1) defines a shareholding company as an enterprise in which [should some parts of this be in quotes?](a) The charter capital shall be divided into equal portions called shares; (b) Shareholders shall be liable for the debts and other property obligations of the enterprise within the amount of capital contribution to the enterprise; (c) Shareholders may freely assign their shares to other persons, except in the cases stipulated in articles 55.3 and 58.1 of this Law; (d) Shareholders may be organisations or individuals; the minimum number of shareholders shall be three and there shall be no restriction on the maximum number. (2) Shareholding companies may issue securities to the public in accordance with legislation on securities. (3) Shareholding companies shall have legal entity status from the date of issuance of the business registration certificate. See National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 1999.*

[29]Private enterprises are provided for under Articles 99 to 104 of the *Law on Enterprises 1999.* Article 99 defines a private enterprise as an enterprise owned by one individual who shall be liable for all activities of the enterprise to the extent of all his or her assets. See National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 1999.*

[30]Partnerships are outlined in the *Law on Enterprises 1999* in Articles 95 to 98. Article 95(1) defines a partnership as a business in which [should some parts of this be in quotes?](a) There must be at least two unlimited liability partners, in addition to whom there may be limited liability partners; (b) Unlimited liability partners must be individuals who have professional qualifications and credibility and shall be

In 2005 Vietnam enacted the *Law on Enterprises 2005* to replace the *Law on Enterprises 1999*. The *Law on Enterprises 2005* is the main corporate law statute, or at least the corporate law governance measure with most wide-ranging effect. It is the closest equivalent to Australia's *Corporation Act 2001.*

However, there are several statutes regulating Vietnamese companies depending on their composition. The *Law on Enterprises 2005* pertains to local Vietnamese private companies.[31] State owned enterprises (SOEs) are in the process of being equitised,

liable for the obligations of the partnership to the extent of all their assets; (c) Limited liability partners shall only be liable for the debts of the partnership to the extent of the amount of capital they have contributed to the company. (2) Partnerships may not issue any type of securities. See National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 1999.* The *Law on Enterprises 1999* is the first real step towards corporate governance for domestic investors in Vietnam. The major contributions the law made were to enact provisions for: rights for shareholders, the role of the Board and Inspection Committee, related party transactions, conflicts of interest and disclosure and transparency.

[31]This thesis focuses on the *Law on Enterprises 2005* unless noted otherwise. The *Law on Enterprises 2005* comprises laws for the following types of company: Limited liability companies outlined in two sections (limited liability companies with two or more members and one member limited liability companies), shareholding companies, partnerships, private enterprises and corporate groups. Limited liability companies are in the following sections; Section 1: Limited Liability Companies with Two or More Members defined in Article 38 as: "1. A limited liability company is an enterprise in which: (a) A member may be an organisation or an individual; the number of members shall not exceed fifty (50); (b) A member shall be liable for all debts and other property obligations of the enterprise within the amount of capital that is has undertaken to contribute to the enterprise; (c) The share capital contribution of each member may only be assigned in accordance with articles 43, 44 and 45 of the law; 2. A limited liability company shall have legal entity status from the date of issuance of the business registration certificate. 3. A limited liability company may not issue shares." Section II: One Member Limited Liability Companies defined in Article 63 as: "1. A one member limited liability company is an enterprise owned by one organisation or individual (hereinafter referred to as company owner); the company owner shall be liable for all debts and other property obligations of the company within the amount of the charter capital of the company. 2. One member limited liability companies shall have legal entity status from the date of issuance of the business registration certificate. 3. One member limited liability companies may not issue shares." Shareholding Companies are defined in Article 77 as: "1. A shareholding company is an enterprise in which: (a) The charter capital shall be divided into equal portions called shares; (b) Shareholders may be organisations of individuals; the minimum number of shareholders shall be three and there shall be no restriction on the maximum number; (c) Shareholders shall be liable for the debts and other property obligations of the enterprise only within the amount of capital contributed to the enterprise; (d) Shareholders may freely assign their shares to other persons, except in the cases stipulated in clause 3 of article 81 and clause 5 of article 84 of this law. 2. Shareholding companies shall have legal entity status from the date of issuance of the business registration certificate. 3. Shareholding companies may issue all types of securities to raise funds." National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005*. Partnerships, private enterprises and corporate groups will not be defined as the relevance of their impact on considerations for directors is covered in the law relating to the other entities unless otherwise noted.

gradually being released into private or non-government hands.[32] Currently, SOEs are regulated by the *Law on State Owned Enterprises* 2003.[33]

> State-owned enterprises (SOEs) operating under the *Law on State-owned Enterprises* are entities in which the State owns 100% charter capital. SOEs are organised under the form of independent State's enterprises and corporations. The Government unitedly acts as the owner representative of the SOEs. Ministries, agencies or Provincial People's Committees have been decentralised and authorised to implement functions as owner representatives. The State invests directly into SOEs, which are allowed to use the State's capital, loans and other legal capital sources to invest in other enterprises which operate under the *Law on Enterprises 2005*.[34]

However, Article 166 of the *Law on Enterprises 2005* states as follows:

> 1. To implement the schedule of annual conversion, but no later than four years from the date on which this Law becomes effective,[35]

[32]For more see "Experience from successful IPO of Vietinbank" at www.vafi.org.vn/2006/index.php. In this process Vietnam might look to Australia and sections 606 and 608 of the Australian *Corporations Act 2001*. These sections relate to the law on takeovers in Australia. They might provide a useful guide for the Vietnamese to consider limits for State equity (20% for example) in corporations. "Section 606 provides for a general prohibition against a person acquiring a 'relevant interest' in a listed company or an unlisted company with more than 50 members, if because of the transaction, that person will increase his voting power to over 20% (if he had less than 20% before the transaction). Further, a person who already holds between 20% and 90% of the voting power in a listed company or an unlisted company with more than 50 members, is prohibited from acquiring any more of the voting shares, unless certain exceptions apply. A 'relevant interest' is defined in s 608. It says that at a person has a relevant interest if she holds securities; or if she has the power to dispose of the securities. A 'relevant interest', then, has to do with control over shares in a company." Corkery JF and Welling B, *Principles of Corporate Law* (Scribblers Publishing, 2008) at 382-3.

[33]For more see National Assembly, Socialist Republic of Vietnam *State Owned Enterprise Law* 2003.

[34]Hoan Nguyen Hoc, "The role of state corporate governance in Vietnam" International Corporate Governance Meeting OECD/World Bank Asia Roundtable on Corporate Governance, Hanoi, December 6, 2004 at 1. There are some corporate governance provisions included in the law on SOEs. For more see National Assembly, Socialist Republic of Vietnam, *State Owned Enterprise Law* 2003.

[35]1 July 2006.

State owned enterprises which have been established in accordance with the 2003 Law on State Owned Enterprises must be converted into a limited liability company or shareholding company in accordance with this Law.

2. Within the period of conversion, the provisions of the 2003 Law on State Owned Enterprises shall remain applicable to State owned enterprises unless otherwise stipulated by this Law.[36]

This places the *Law on Enterprises 2005* as the central piece of law for corporations in Vietnam.[37] The *Law on Enterprises 2005* provides for and regulates the following entities:

1) Limited liability companies with two or more members[38]

2) One member limited liability companies[39]

3) Shareholding companies[40]

4) Partnerships[41]

5) Private enterprises,[42] and

6) Corporate groups[43]

[36]National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005*.
[37]The *Law on Enterprises 2005* goes further than the *Law on Enterprises 1999* in terms of corporate governance measures and includes both foreign invested and domestic companies. Areas of improvement, which are covered in greater depth throughout the thesis, include improved transparency and disclosure, more rights in general meetings, more rights of action against directors.
[38]Provisions for these companies are covered in Articles 38 to 62 (as well as the general provisions) in the *Law on Enterprises 2005.*
[39]The member (investor) of this company may be an entity or an individual. Under the *Law on Enterprises 1999*, it was not possible for an individual to invest in this form of company. Articles 63 to 76 of *Law on Enterprises 2005* cover the specific provisions for these companies.
[40]Articles 77 to 129 in the *Law on Enterprises 2005* cover the specific provisions for these companies.
[41]Articles 130 to 140 in the *Law on Enterprises 2005* cover the specific provisions for these companies.
[42]Articles 141 to 145 in the *Law on Enterprises 2005* cover the specific provisions for these companies.
[43]Articles 146 to 149 in the *Law on Enterprises 2005* cover the specific provisions for these companies.

Other relevant provisions relating to corporate affairs in Vietnam include:

Bankruptcy Law (Law No. 21/2004/QH11) enforced on 15 October 2004.[44]

Decision Promulgating Regulations on Corporate Governance Applicable to Companies Listed on the Stock Exchange or a Securities Trading Centre (No 12/2007/QD/BTC) dated 13 March 2007.[45]

Decision Issuing the Model Charter Applicable to Companies Listing on the Stock Exchange/Securities Trading Centre (No15/2007/QD/BTC) dated 19 March 2007.[46]

Circular on Disclosure of Information on the Securities Market (No 38/2007/TT/BTC).

Decree on Regulating Offshore Direct Investment (No 78/2007/ND/CP) dated 9 August 2007.

Decree Providing Detailed Guidelines for Implementation of a Number of Articles of the Law on Enterprises (No 139/2007/ND/CP) dated 5 September 2007.

[44] This Law replaced the *Bankruptcy Law dated 30 December 1993.*
[45] This Decision is sometimes referred to by commentators as "the code" on corporate governance.
[46] This Decision is most often referred to as the "model charter".

Decree Providing Detailed Provisions and Guidelines for Implementation of a Number of Articles of Law on Investment (No108/2006/ND/CP) dated 22 September 2006.

Circular Providing Guidelines for Implementation of Accounting and Auditing regimes applicable to Enterprises and Organizations with Foreign Owned Capital Operating in Vietnam (No. 122/2004/TT/BTC) dated 22 December 2004.

2.6 WTO influence

Directors' powers and duties form part of the corporate governance framework that businesses use to direct and control their affairs. Common enterprises are organised worldwide in separate corporate entities governed by boards or councils of directors. The boardroom is the fulcrum of the company, its management centre. According to Cung and Robertson, "corporate governance is an issue at the heart of economic reform in Vietnam."[47]

As businesses look for investment, especially foreign investment in their corporate enterprises, then investors, whether creditors or shareholders, will seek protection for their investment.[48] To invest means to take risk. The only way to provide meaningful comfort for shareholders, especially minority shareholders, is to have adequate corporate governance measures in place that provide for an appropriate means for

[47]Cung ND and Robertson S, "Corporate Governance in Vietnam" *Policy Brief #36*, The William Davidson Institute, University of Michigan (Unpublished paper, 2005) at 1.
[48]One example of this is the ADB stipulation that five company law reforms were required by Vietnam in order secure a Financial Sector Development and Capital Market Loan. See Tripp C and Young S, "Enterprise Law Reform – Some Issues and Suggestions" (1995); Interim Report, "Enterprise Reform Legal and Regulatory Issues" (ADB, 1997) 41-45.

measuring the shareholder's risk.[49] Without strong corporate governance measures, the ability to secure foreign investment, in particular, is diminished relative to firms that do offer strong governance. A 2002 McKinsey & Company report found that companies implementing good corporate governance practices would typically generate a 10-12% increase in their valuations as a result of these practices.[50]

Further to these findings, various other studies into the rule of law and quality of enforcement, sometimes referred to as the "law matters" thesis, conclusively support strong corporate governance as means of ensuring strong financial markets. La Porta et al conclude:

The results of this article confirm that the legal environment – as described by both legal rules and their enforcement – matters for the size and extent of a country's capital markets. Because a good legal environment protects the potential financiers against expropriation by entrepreneurs, it raises their willingness to surrender funds in exchange for securities, and hence expands the scope of capital markets. Our results show that civil law, and particularly French civil law, countries, have both the weakest investor protections and the least developed capital markets, especially as compared to common law countries… are poor laws just a proxy for an environment that is hostile to institutional development, including that of capital markets? In this connection, we have found some evidence that public and private institutions are less effective in

[49]A World Bank study concluded that investors are willing to pay a premium for companies with good corporate governance practices, because the risks are lower for those companies. See Klapper LF and Love I, "Corporate Governance, Investor Protection and Performance in Emerging Markets" World Bank Policy Research Working Paper 2818, April 2002.

[50]See Newell R and Wilson G, "A Premium for Good Governance" *McKinsey Quarterly* No 3, 2002. See also Hoschka TC, Nast GR and Villinger R, "Better Boards in Thailand" *McKinsey Quarterly* No 3 2002. This research found that Thai companies with the best overall corporate governance were achieving market valuations 45% higher than the average for the companies in the bottom quartile of corporate governance standards.

countries exhibiting low levels of trust among citizens. It is possible that some broad underlying factor, related to trust, influences the development of all institutions in a country, including laws and capital markets.[51]

Vietnam currently has separate provisions for State and private enterprises, although these will soon converge. Private enterprises have often been able to raise capital via internal or familial means. But gaining access to foreign investment for larger projects has been an increasing focus for Vietnamese companies. With weak corporate governance this task of raising and retaining capital is difficult.[52]

The role of the government in strengthening or ensuring more competent corporate governance is particularly important. It is stepping back from regulatory intervention, yet encouraging good governance by regulation and enforcement. This requires deft judgments and processes, and there will be bureaucratic inertia and even resistance to the relinquishing of control.

[51]La Porta R, Lopez-De-Silanes F, Shleifer A and Vishny RW, "Legal Determinants of External Finance" (1997) Vol LII No 3 July, *The Journal of Finance* 1131-50 at 1149 and 1150. See also Walker G and Fox M, "Corporate Governance Reform in East Asia" (2002) Vol 2 No 1 *Corporate Governance* 4-9.

[52]This is reflected in the World Bank *2009 Doing Business Report* that illustrates a comparative weakness for Vietnam in corporate governance compared to many of its East Asia and Pacific counterparts. In particular, the director liability index and ease of shareholder suits index are significantly below the regional average. The director liability index is 0 compared to a regional average of 4.6 out of a maximum of ten score. The ease of shareholder suits index is 2 compared to a regional average of 6.3. "The indicators describe three dimensions of investor protection: transparency of transactions (Extent of Disclosure Index), liability for self-dealing (Extent of Director Liability Index), shareholders' ability to sue officers and directors for misconduct (Ease of Shareholder Suits Index) and Strength of Investor Protection Index. The indexes vary between 0 and 10, with higher values indicating greater disclosure, greater liability of directors, greater powers of shareholders to challenge the transaction, and better investor protection." http://www.doingbusiness.org/ExploreEconomies/?economyid=202. Last visited 22 September, 2009. Other countries in the region, such as China, are ahead of Vietnam in their efforts to improve their governance. "China's decision to join the WTO was a clear attempt to benchmark its economic activities to international standards and to ensure the future growth of the economy was along the lines of its comparative advantage." Bhattasali D, "Accelerating Financial Market Restructuring in China" in *China and the WTO* (World Bank and Oxford Press, 2004) at 187.

> Vietnam is still coming to terms with the 800 pound gorilla that the private sector represents. In addition, enshrined officials and managers in State Owned Enterprises are reluctant to carry out reforms that will directly reduce their position. Corporate governance is a system that must be institutionalised as a part of standard business practices. This will require both a paradigm shift in the way the private sector conducts business and clearer definition of the State's responsibilities in regulating the economy. The current enforcement mechanism of selecting a handful of scapegoat firms to carry to the chopping block the sins of all firms is overly destructive. This practice of regulation 'by example' does not institutionalise corporate governance and the unpredictability of 'which goat is next' only adds unidentifiable risk.[53]

As in China, Vietnam's accession to the WTO has made the focus on the government's efforts in corporate governance even more prominent, with increasing attention being given to the tangible progress being made in improving corporate governance.[54]

[53]Note 47 at 3.

[54]China provides Vietnam with a good example of what to expect in terms of reform. Referring to China's reform measures in relation to the WTO, Bhattasali states: "China's commitments to liberalizing its financial services industry, and indeed its General Agreement on Trade in Services (GATS) commitments as a whole, are possibly the most radical offerings ever negotiated in the history of the WTO." Bhattasali D, "Accelerating Financial Market Restructuring in China" in *China and the WTO* (World Bank and Oxford Press, 2004) at 186. "Viet Nam's accession to the World Trade Organization in early 2007 improved its attractiveness for foreign investors by making the policy framework more predictable." The Asian Development Bank, *Country Operations Business Plan Vietnam 2009-2011* November 2008 at 1.

2.7 Legal system, Courts and enforcement

Vietnam is a civil law country where, unlike common law jurisdictions, case law and precedent are not important parts of the legal framework. Courts do not, nor are they required to, observe case law precedents as a source of law.[55] As a result very few cases are reported. Cong sets out the Vietnamese situation best when discussing the role of the Courts:

> In the tradition of western jurisdictions, [the] supreme Court takes a key role in setting precedents, which exist simultaneously with, and significantly contribute to the interpretation of, the written laws enacted by the Parliament…. However, Vietnam, as many other countries in the previous Soviet bloc, does not accept and adopt the concept of case law as a source of law. Judgments rendered by Courts do not form a source of written law interpretation. Although some judgments set precedent with great impact on the development of laws, inferior Courts do not always and are not forced to take paths of judgment as may be designed from time to time by the supreme Court in conclusive rulings.[56]

[55]"Several recent studies conclude that the Vietnamese have little, if any, trust in their Courts. Vietnam has no separation of powers and its Courts are accountable to the National Assembly (Constitution 1992, Art 126-136). Judges and Court officials are traditionally approved by the Party and therefore – as with all relatively seniour bureaucrats – are required to implement the will of the Party according to the Communist Party Statute (SRVN CPV Statute, Art 2(1) and 23(1)." Nicholson P, "The Vietnamese Courts and Corruption" in Lindsey T and Dick H (eds), *Corruption in Asia* (Federation Press, 2002) at 201 and 205.

[56]See Appendix B Cong DL, *Role of Courts in Building Case Law* (unpublished paper) at 1.

Vietnamese judges are appointed by the party and have the right to adjudicate on cases independently of any prior judgment by a higher Court on a similar case or law.[57] Many judges lack formal legal training and their positions are reviewed regularly by the State. As a result there is no separation of powers between the judiciary and the state as in Western democratic legal systems.[58] In time, Vietnam may follow in the footsteps of China which is moving towards an increased independence of the Courts and stronger legal education for judges.[59]

The Vietnamese State Securities Commission (SSC) was set up in 1996 as the securities regulator. Since 2004 the SSC has been an agency under the authority of the Minister of Finance. The Ho Chi Minh and Hanoi Securities Trading Centres (STCs) are responsible for providing for and monitoring trading in corporate securities. The SSC oversees the activities of two Securities Trading Centres. The World Bank Report on Vietnam in 2006 reflects the way the SSC is viewed in the broader context:

[57]As Neilson outlines, "[The Vietnamese] Law's acceptance of a 'market economy with Vietnamese characteristics' was only codified some five years later in the 1992 Constitution. That same constitution also, for the first time, formally subjected the Party and the government to the rule of law. That means that both institutions must ultimately find their authority and legitimacy in legislation emanating from the National Assembly. However, rule of law in this context might better be described as rule by law in a single party state because questions of constitutionality, due process and official illegality are not reviewable by an independent judiciary." Neilson WAW, "Reforming Commercial Laws in Asia: Strategies and Realities for Donor Agencies" in Lindsey T, (ed) *Indonesia: Bankruptcy, Law Reform and the Commercial Court* (Desert Pea Press, 2000) at 15.

[58]Sidel outlines the politics of this situation in a related discussion about constitutional review and enforcement: "In Vietnam there appears to be a growing acceptance both of the need for an institutional arrangement to sort out statutory conflicts with the Constitution and other laws, and of the demand for some sort of 'constitutional protection' by business groups, academics, and others. And, somewhat more particular to the Vietnam case, acceding to that demand and need also enables the Party and state to wrest away a constitutional initiative from both domestic and oversees dissidents. But the key issues of scope and from remain; they are fundamentally political, and they are closely related to whether the Party will be subject to the constitutional review and enforcement that emerges." Note 3 at 69.

[59]"[In China] Courts continue to be subject to Party leadership. Nevertheless, scholars in China have argued that the Courts have gradually shifted from primarily serving as political tools in criminal campaigns in the early 1980s to focusing on providing justice in individual cases today… Many judges have replaced their military-style uniforms with robes… Likewise, the new education requirements for judges represent a shift away from primary reliance on political backgrounds in selecting members for the judiciary. Depoliticization – to the degree it has occurred – may be possible precisely because the Courts are not a challenge to Party authority…" Liebman BL, "China's Courts: Restricted Reform" in Clarke DC, *China's Legal System: New Developments, New Challenges* (Cambridge, Cambridge University Press, 2008) in 73.

> Under the recently approved *Law on Securities* 2006, the SSC is not an independent securities regulator. It lacks authority and the required resources to act as an effective securities regulator. Enforcement actions by regulators have been rare, and have not gone beyond the issuance of notices. Currently the STCs operate practically as departments within the SSC. The informal market is not regulated, and the quality of information of those companies trading in the informal market is poor.[60]

Joint Stock commercial banks and credit organisations are regulated by the State Bank of Vietnam and insurance companies are monitored by the Minister of Finance.

2.8 Modern context and cultural considerations

As a final precursor to a detailed discussion of directors' powers and duties in Vietnam the current context of law and society in Vietnam is required.

One of the reasons for an emphasis in Vietnam on growing the economy is the rapidly increasing labour force.[61] Because Vietnam has a relatively young population it often has a labour force growth rate that outstrips its population growth rate. From a political perspective, keeping the bourgeoning labour market employed is a high priority. In turn, growing the economy is imperative. This then leads to increasing pressure on the

[60]The World Bank, *Report on the Observance of Standards and Codes (ROSC): Corporate Government Country Assessment Vietnam*, June 2006 at 3.

[61]"A major presumed motivation for continued economic reforms is finding employment for the over 1 million new entrants in the labor force every year. Indeed, job creation is perhaps the key to the vibrancy of the ruling Vietnamese Communist Party (VCP), as economic growth increasingly becomes its main source of legitimacy." Manyin ME, Cooper WH and Gelb BA, "Vietnam PNTR Status and WTO Accession: Issues and Implications for the United States" *CRS Report for Congress* (October 2006) at 17. See also < http://www.osh.netnam.vn/html/ENGLISH/population.htm>.

regulatory measures required to continue to grow the economy, particularly when this growth is largely dependent on foreign investment.

There is no doubt Vietnam is in a transition phase as its economy and society emerge into a more robust market economy from a long history of being a State driven economy. From a legal point of view the history of Vietnamese company law, in particular, is almost entirely based on legal borrowings.[62]

How long will this transition take? What factors will impact on the transition? How will Vietnam compete with, and adjust to, other emerging countries in the surrounding Asian region? What is the impact of legal borrowings or imports on the cultural context and understanding of business? Only with time can we know the answers to these questions, but the pace of change is impressive.

Some commentators, such as Gillespie, observe that Vietnam will never adopt or understand some of the key concepts required for a strong corporate governance framework.

Vietnamese entrepreneurs, on the contrary, receive contradictory ideological messages. Market entry deregulation conveys the ideology of commercial freedom promised by *doi moi* economic reforms. But the daily reality of "state economic management" reinforces the impression that socialist planning remains the primary allocative force.

[62]"Law reformers believed that regulations governing company formation and organization were integral elements of modern commercial legal systems, but reforms could not wait decades required to construct a corporate law regime from local commercial practices. Reluctantly, lawmakers turned to Western laws for inspiration… In the end, imported corporate rules formed a mosaic of legal norms, overlaying, but rarely informing official decision-making, much less commercial habits, customs and traditions." Gillespie J, Note 18 at 185. For more also see Bui H, "Vietnamese Company Law: The Development and Corporate Governance Issues" (2006) Vol 18 Issue 1 *Bond Law Review* 22-44.

Put differently, company law norms are important in East Asian countries that emphasise the economic and cultural values embedded in the norms, such as shareholder interests, corporate management and creditors' rights. They are less important in countries like Vietnam where the dominant ideology undermines corporate values… State economic management suppresses the emergence of the types of entrepreneurial organisations and markets that support and maintain Western company law. Without supportive non-state institutions, businesses construct defensive family structures and form particularistic, frequently corrupt alliances, with State bureaucrats.[63]

Others suggest that Vietnam, like China, is simply borrowing legal concepts for the expediency of building governance structures, while not understanding the legal theory and principles behind these concepts.[64] Neither of these views strikes a blow against the fundamentals of corporate governance principles. The reasons for having good corporate governance are independent of comparative law, legal transition, political structure or ideological arguments. Good corporate governance is not tied to political ideology. Adopting good corporate governance in the business context does not weaken the communist state.

[63]Gillespie J, Note 18 at 227-228. This finding is also reflected in the Vietnamese reluctance to adopt internal measures of governance within their companies. For example, the *Enterprise Law 2005* allows shareholders to decide certain company matters and include them in the company charter. This is similar to the Australian use of replaceable rules. However as Minh and Walker state, "Vietnamese investors do not appear to pay much attention to a company's Charter. In practice, most Vietnamese companies have a Charter with the same requirements, quorum and ratios as prescribed by the *Enterprises Law 2005*." Minh LT and Walker G, "Corporate Governance of Companies Listed in Vietnam" (2008) Vol 20 No 2 *Bond Law Review* 118-197 at 125-126.

[64]"China's company Law does contain provisions on directors' duties. These provisions do not, however, 'conclude enquiry as to their responsibilities, but only gives it direction'. This is also true, in a sense, of the common law's 'elastic use' of the fiduciary concept… at common law, the statutory provisions are the expressions of duties that have been developed over time – the 'end point' in a sense. The expressions imported into Chinese legislation modelled on provisions found in western law, is more of a 'starting point' – the language is imported, but not the heritage that culminated in these expressions." McNaughton A, "Directors' Duties Under China's Company Law: Something Borrowed, Something New" (1999) Vol 6 Nos 1& 2 *Canberra Law Review* 167-192 at 172. On a different point, some might claim that it is impossible to understand (due to cultural or language barriers) the imported law which merely reaffirms the reasons why this practice ought to be avoided. Why adopt something that is not understood and may well be impossible to understand?

It is a legitimate choice to reject improvements to corporate governance or attempts to incorporate good governance frameworks into the business culture. This choice, however, will come at a cost, which is a diminished ability to compete with companies that do adopt good governance. This applies on the macro scale as much as the micro. Countries that are strong on good corporate governance will out-perform those with little or no corporate governance.

It is understood and accepted that emerging economies need time for transition. Transition is one thing; never adopting or understanding key principles is another.[65] Arguably, some concepts may take longer to become fully incorporated in the day-to-day workings of companies than others.[66]

The concept of risk is not solely an Anglo-American phenomenon; it is understood intuitively and universally, notwithstanding different cultural contextual adaptations. Furthermore, if a concept is adopted to form part of the corporate governance framework, for the purposes of attracting foreign investors, then the assumption must be that the meaning the foreign investor attaches to that concept is the meaning intended.[67] Thus, it is incumbent upon the adopters to avail themselves of the meaning of the concepts that they are persuading others to assume they understand and practise.

[65]This is not to infer a paternalistic approach. Rather that the development of good corporate governance that is based on appropriate principles, reagardless of the form they take, is important. If one is going to merely 'adopt' these principles then there is a requirment to demonstrate what the principles are understood to mean in their 'adopted' state and to represent this interpretation to avoid confusion.

[66]The process of transition is understood by agencies like the WTO and the World Bank and they reflect this in their reports and by giving transition countries like Vietnam specific timelines to enable them to both demonstrate progress and move through the transition phase in a meaningful way. See Note 59.

[67]"Initially, law reforms sought to attract and accommodate foreign investment, however, since accession to the Association of South East Asian Nations (ASEAN) in 1995 and a United Nations Bilateral Trade Agreement in 2001, the orbit of legal harmonisation has broadened to encompass trade, taxation, tariffs, transport, customs protocols and banking." Gillespie J, Note 18 at 186.

If the adopters do not understand, agree with, or practise the borrowed laws, then they should not adopt them. This would be tantamount to misrepresentation. Moreover, if the principles of good governance are found not to exist in practice, then the desired international legitimacy will not last, leaving an even greater task, to convince foreign investors of the future of the merits of investment.

Chapter Three

Directors

3.1 Introduction

Australian companies are currently regulated by the *Corporations Act 2001*[1], which is administered by the Australian Securities and Investments Commission (ASIC) via the *Australian Securities and Investments Commission Act 1989*.[2] Other aids to corporate regulation, which affect directors' obligations, exist in the form of the Australian Stock Exchange (ASX) *Listing Rules, The Principles of Good Governance and Best Practice Recommendations* set out by the ASX Corporate Governance Council and a number of other guidelines generated by the private sector.[3] Australian corporate law has evolved historically from English law, experiencing a somewhat complicated journey as a result of each State in Australia enacting its own corporations law.[4] Various attempts have been made to unify or 'federalise' the law.[5]

In contrast to Australia, Vietnam has an unsophisticated but emerging corporate sector and a corresponding undeveloped corporations legal framework.[6] However, there are recent statutes on corporate law. Currently there are different laws regulating Vietnamese companies, depending on their composition. The *Law on Enterprises 2005*

[1]*Corporations Act 2001* (Cth) of Australia. See also Baxt R and Harris J, *Corporations Legislation 2008* (Thomson Legal and Regulatory, 2008)
[2]In 1997 the Australian Government also introduced the Corporate Law Economic Reform Program (CLERP) as an attempt to improve business regulation in accordance with international best practice. For more see Black A, Bostock T, Golding G and Healey D, *CLERP and the new Corporations Law* (Butterworths, 2000) and McConvill J, *An Introduction to CLERP 9* (LexisNexis Butterworths, 2004)
[3]One example of this is the Australian Institute of Company Directors.
[4]For more see Cassidy J, *Concise Corporations Law 5th Edition* (The Federation Press, 2006)
[5]Ibid.
[6]For more see Lockhart G, "Vietnam: Social Order and Business Culture in the Age of Globalisation" in Sampford C, Condlln S, Palmer M, and Round T (eds), *Asia Pacific Governance: From Crisis to Reform* (Ashgate Publishing Co, 2002). See also Freeman NJ, "Promoting Good Corporate Governance Practices in Vietnam" in Ho KL (ed), *Reforming Corporate Governance in Southeast Asia* (ISEAS publications, 2005).

pertains to local Vietnamese public and private companies.[7] Currently, State owned enterprises (SOEs) are regulated by the *Law on State Owned Enterprises 2003.* The *Law on Investment 2005* regulates foreign-invested companies.[8]

This vastly different historical, social, economic and legal background makes the investigation of the role and responsibilities of the company director both interesting and challenging. Although the cultural and political differences between Vietnam and other jurisdictions are not irrelevant, those complex issues are left for other commentaries.[9]

3.2 Directors – definitions

Article 55 (1) of the Socialist Republic of Vietnam *Law on Enterprises 2005* defines a director as:

> Giám đốc hoặc Tổng giám đốc công ty là người điều hành hoạt động kinh doanh hằng ngày của công ty, chịu trách nhiệm trước Hội đồng thành viên về việc thực hiện các quyền và nhiệm vụ của mình.

[7]See National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005*.
[8]For more see Freeman NJ, "Promoting Good Corporate Governance Practices in Vietnam" in Ho KL (ed), *Reforming Corporate Governance in Southeast Asia* (ISEAS publications, 2005). Also Magennis W and Hai NT, *Law in Vietnam* (Melbourne, The Law Printer, 1992) and Phillips Fox Lawyers, *Circular 215-UB-LXT On Guidelines for Foreign Direct Investment Activities in Vietnam* (The Law Printer, 1994)
[9]This exploration does not include a commentary on the pros and cons of the cultural and political differences between Vietnam and other countries. Consideration of the relative merits of what might be viewed as a "Western legal framework" in an Asian context is left for others. For more on this discussion see Lockhart G, "Vietnam: Social Order and Business Culture in the Age of Globalisation" in Sampford C, Condlln S, Palmer M, and Round T (eds), *Asia Pacific Governance: From Crisis to Reform* (Ashgate Publishing Co, 2002), and Gillespie J, "Importing Law Reform: Vietnamese Company Law as a Case Study" in Macmilllan F (ed), *International Corporate Law Annual* (Hart Publishing, 2003)

The best English translation of this is:

> The director or general director of the company is the person who manages the day-to-day business operation of the company and is responsible to the Members' Council for the exercise of his or her rights and the performance of his or her duties.[10]

This refers to directors in limited liability companies.[11] No distinction is made between the director and general director, and this appears to be just a matter of nomenclature. One is appointed as a 'director' or a 'general director' and the title is of little consequence.[12]

Unlike other jurisdictions, there is no specific provision for shadow or *de facto* directors to be included in the directors' duties. However, it could be argued that the definition provided in Article 55 (1) captures *de facto* directors if they are deemed to fit within the definition provided: "someone who manages the day to day business operations of the company and is responsible to the Members' Council for their rights, performance and duties".

[10]Also Article 116 of the Law stipulates that "The director or general director shall manage the day-to-day business operations of the company; shall be supervised by the Board of Director and shall be responsible to the Board of Director and before the law for the exercise of his or her delegated powers and the performance of his or her delegated duties." Note 7.
[11]As outlined earlier *The Law on Enterprises* outlines two types of limited liability companies: 1. Limited Liability Companies with Two or More Members and 2. One Member Limited Liability Companies. Ibid.
[12]"The *Enterprise Law 2005* does not distinguish between the terms 'director', 'manager' and 'officer'. Vietnamese law in general as well as the *Enterprise Law 2005* in particular does not differentiate between the managing director, executive director, non-executive director and independent directors as understood in Western jurisdictions." Minh TL and Walker G, "Corporate Governance of Listed Companies in Vietnam" (2008) Vol 20 No 2 *Bond Law Review* 118-196 at 144.

Section 9 of the Australian *Corporations Act 2001* of Australia defines a director as:

> (a) a person who:
>
> (i) is appointed to the position of director; or
>
> (ii) is appointed to the position of an alternate director and is acting in that capacity; regardless of the name that is given to their position; and
>
> (b) unless a contrary intention appears, a person who is not validly appointed as a director if;
>
> (i) they act in the position of a director; or
>
> (ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes.[13]
>
> Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship or the company or body.[14]

Perkins v Viney illustrates s 9(b)(i) where the Court held that the defendant had acted as chairman of the board, and undertook various other roles that indicated that he was a director, despite his claim that he had not been properly appointed or consented to be a

[13]Note 1. Cassidy adds the following notes to this section: "Section 9(a) is intended to include directors who may be called by some other title, such as 'Governor' or 'President'. Section 9(b)(i) includes 'de facto directors' who may for example: not have been validly appointed initially as they failed to satisfy a prerequisite; no longer validly hold office as a result of a supervening disqualification; have resigned as director but not notified ASIC, or have assumed a greater authority than that attaching to their office." Note 4 at 179.

[14]Note 1. There is a note included in the legislation to outline examples for paragraph (b) which states: "…provisions for which a person referred to in paragraph (b) would not be included in the term 'director' are: section 249C (power to call meetings of a company's members) subsection 251A (3) (singing minutes to meetings) section 205B (notice to ASIC of change of address)." Baxt R and Harris J, Note 1 at 32.

director.[15] Directors who come under this provision are often referred to as *de facto* directors.[16]

Section 9(b)(ii) relates to what are often termed 'shadow directors'.[17] This refers to a situation where the board is accustomed to acting in accordance with the shadow director's instructions or wishes. This does not apply to professionals providing advice due to their business relationship with the directors or the company, such as solicitors or consultants.[18]

[15]Burley J stated: "In my view, Mr Clark [fourth defendant] acted in the position of director within the meaning of Section 60(1) of the Law. He did so both factually in the sense that his contribution and activity was what a director would do. He also, as a matter of law, acted as a director in the sense that he occupied a position which could only have been held by a director under the company's articles. He was held out to be a director. He was shown as a director on various notices sent to ASIC and in financial statements published from time to time he was referred to as a director." *Perkins v Viney* [2001] SASC 362 paragraph 38.

[16]"Persons who have not been validly appointed, or who are not qualified to act but who stand in the position of director, cannot avoid the statutory burdens of directors and officers." Corkery JF, *Directors Powers and Duties* (Longman Cheshire Pty Limited, 1987) at 9.

[17]"The difference between liability as a *de facto* director and as a shadow director is that the former has openly acted as if he had been validly appointed, whether or not there are other, properly appointed, directors, whereas the definition of shadow director presupposes that there is a board of directors who act in accordance with instructions from someone else, the eminence grise or shadow director. The last thing that the latter will want is to advertise the fact that he is exercising this improper influence and nor will the proper directors, who are breaching their duties by as acting as his puppets." Davies PL and Prentice DD, *Gower's Principles of Modern Company Law 6th Edition* (Sweet and Maxwell Ltd, 1997) at 183.

[18]In *Mistmorn Pty Ltd* (in liq) *v Yasseen* Davies J said: "Mr Yasseen and Mrs Hamad both directed the affairs of the company. The distinction between a consultant to and a director of a corporation is often said to be that the former is engaged to perform specific functions whilst the latter is engaged in the affairs of the corporation generally." See eg. *Australian Securities Commission v AS Nominees Ltd* (1995) 133 ALR 1 at 53, per Finn J; *Standard Chartered Bank of Australia Ltd v Antico* (1995) 18 ACSR 1 at 70, per Hodgson J. Mr Yasseen fell into the latter category, notwithstanding that his attention to Mistmorn's affairs was not full-time. He was subject to the duties which a director of Mistmorn owed to it: *Corporate Affairs Commission v Drysdale* [1978] HCA 52; (1978) 141 CLR 236. Those duties were discussed by Rogers CJ in *Comm. Div. in AWA Ltd v Daniels* (1992) 7 ACSR 759 at 864-873. See also *Daniels v Anderson* (1995) 37 NSWLR 438 at 495-502; *Kinsela v Russell Kinsela Pty Ltd* (In Liq) (1986) 4 NSWLR 722 at 730-3." *Mistmorn Pty Ltd (in liq) v Yasseen* [1996] FCA 1673 paragraph 44. [my italics]

As Corkery and Welling state:

> …if you behave like a director, no matter what you are called, you may be a director for the purposes of the Act, and subject to the directors' liabilities.[19]

3.2.1 *The FJSC case*

In this Vietnamese case two boards of the same company both considered themselves the lawful decision makers of the company. Because neither board would concede to the other, investors and other parties wanting to do business with the company could not have confidence in being able to form binding agreements. Although this case precedes the *Law on Enterprises 2005* it remains useful for illustrative purposes, and the current law does not prevent the same issues from arising.

The Friendship Joint Stock Company (FJSC) is an equitised state-owned enterprise (SOE). In May 2000 the Board of Management refused a request by shareholders to hold a general meeting, despite its failure to comply with the company's constitution to have a general meeting within the first 90 days of the year. In July 2000 the company's Vice Chairperson ceased the company's business as of July 8, 2000. The Board of Management tried to hold a general meeting of shareholders in October 2000 but this meeting failed due to disruption by shareholders.

[19]Corkery JF and Welling B, *Principles of Corporate Law* (Scribblers Publishing, 2008) at 145. Also in *Corporate Affairs Commission v Drysdale* in referring to the history of the definition of 'director' Murphy J states: "The history of the definition is somewhat curious and perhaps worth noting. Its origin appears to be in the *Companies Clauses Consolidation Act, 1845 (U.K.*), s. 3 of which contains the following provision: "'Directors', - the expression 'the directors' shall mean the directors of the company, and shall include all persons having the direction of the undertaking whether under the name of directors, managers, committee of management, or under any other name. In the *Joint Stock Companies Acts, 1856 and 1857 (U.K.)* and in the *Companies Act, 1862 (U.K.)* there was no definition of the word 'director', but, by the *Companies Act, 1900 (U.K.)* s. 30, a definition was introduced which has survived in subsequent consolidations without change. It was as follows: "The expression 'director' includes any person occupying the position of director by whatever name called." (at p248)" *Corporate Affairs Commission v Drysdale* [1978] HCA 52; (1978) 141 CLR 236 at paragraph 12. [my italics]

In February 2001, the Chairman of the supervisory board held a meeting that elected a new board of management and a new supervisory board. These newly elected boards were opposed by the originally constituted boards on the grounds that they were illegal. The case proceeded to Court in June 2001 where the Economic Court of Hanoi held that the February 2001 shareholders meeting was indeed illegal as only the Chairman of the Board of Management (as opposed to the Board of Inspectors) could call a general meeting.

In June 2002 the case was appealed at the Supreme People's Court who upheld the decision of the Economic Court of Hanoi.

As a consequence further attempts to hold general meetings were disrupted and a final attempt to resolve the stand-off was a meeting of shareholders in October 2002 which elected new boards of management and inspectors. Once again the originally constituted boards failed to recognise the newly elected boards.

In July 2005 the company's business registration certificate was suspended by the Hanoi Authority for Planning and Investment. In August 2005 a number of shareholders attempted to sue the Peoples' Committee of Hanoi, but the claim was rejected on 12 September 2005.[20]

[20]For more on FJSC see www.hapi.gov.vn; www.mof.gov.vn; www.nscerd.org.vn and www.hanoimoi.com.vn see also *Day Sai Gon Manufacturing Services Trading Joint Stock Company* case number 352/2006/TLST-KDTM dated 08/06/2006 at Ho Chi Minh City People's Court Judgement Number: 511/2006KDTM-ST (Appendix C) and *JLG Company* case www.baobinhduong.org.vn/detail.aspx?Item=8370 and www.baobinhduong.org.vn/detail.aspx?Item=8771 and www.vietbao.vn/An-ninh-Phap-luat/Bi-sa-thai-trai-mot-tong-giam-doc-duoc-boi-thuong-1-3-ty/10981158/218

This case illustrates a number of issues for corporate governance in general and directors' duties in particular for Vietnam. The case shows the inability of the Court's decisions to prevent or dissuade the various players within the company from continuing to pursue their own interests.

Among other key issues that are relevant for other chapters in this thesis, 'de facto' directors are one problematic aspect of the FJSC case. For several years the company had two boards of management and two supervisory boards. Each pairing of boards believed they were lawfully representing the company.

In other jurisdictions, 'de facto' directors can also have duties that in turn help to protect investors when there are situations whereby a 'de facto' director breaches duties and causes damage to the company.

As indicated, the current provisions *could* be interpreted by the Courts to avoid the concerns represented by 'de facto' directors without amending the legislation. The Court, however, needs to be fully aware of the problems 'de facto' directors can cause for the company.

3.2.2 *The Minh Phung-Epco case*

Minh Phung set up multiple companies that were overseen by directors whom he 'controlled'. In effect Minh Phung was a shadow director and organised for the various CEOs of the different companies he commanded to negotiate large loans with several Vietnamese banks. Minh Phung was convicted of fraudulent misappropriation over the

substantial funds he raised from the banks, but the Court was silent on his role as a shadow director.[21] Either the Court felt the companies were merely agents of Minh Phung and that he as principal was directly liable for the activities, or Minh Phung was liable as a *de facto* director for the misdeeds of the companies.

3.3 Executive and non-executive directors

Section 49(1) of the *Law on Enterprises 2005* states:

> The Members' Council shall elect a member to be its chairman. The chairman of the Members' Council may concurrently work as the director or general director of the company.[22]

This Article applies to limited liability companies with two or more members and the same provision is reflected in Article 111 in relation to the Chairman of the Board of Management for shareholding companies. Article 69 referring to the Chairman of the company for one member limited liability companies does not confer the same rights. Instead, Article 70 (1) concerning the Director or General Director states:

> The Members' Council or the chairman of the company appoints or employs a director or general director for a term not exceeding five years to manage the day to day business operation of the company.[23]

Both Article 49 (1) and Article 70 (1) create a situation that would amount to having an executive director on the assumption that the director or general director was a full-time

[21]See also *The Nam Bac Company Case.*
[22]The term "work as" is not defined or clarified. Note 7.
[23]Ibid.

employee of the company. The other various provisions regarding Members' Councils (for limited liability companies) and the Board of Management (for shareholding companies) do not exclude non-executive directors.[24]

Boards in Australia can be comprised of both executive and non-executive directors.[25] A non-executive director is not an employee of the company. An executive director, however, has a full-time contract with the company as an employee.[26] Non-executive directors or independent directors have been the centre of some debate as a possible source of increased probity for boards due to their alleged objectivity.[27] In Vietnam, the board of management of listed companies must be comprised of at least one third non-executive independent members.[28]

[24]As outlined in earlier chapters, the main differences between a limited liability company and a shareholding company in Vietnam are as follows: only shareholding companies can issue shares; a limited liability company cannot exceed fifty members; a shareholding company must have a minimum of three members and has no maximum number; shares in shareholding companies can be freely assigned with two exceptions (Article 81(3) Voting preference shareholders may not assign such shares to other persons, and Article 84(5) Within a period of three years from the date of issuance of the business registration certificate to the company, ordinary shares of founding shareholders my be freely assigned to other founding shareholders, but may only be assigned to persons not being founding shareholders if approved by the General Meeting of Shareholders. In this case, shareholders intending to assign shares may not vote on the assignment of such shares and the assignee shall automatically become a founding shareholder of the company. After three years from the date of issuance of the business registration certificate to the company, all restrictions on ordinary shares of founding shareholders shall be lifted.), whereas the assignment of shares for members in limited liability companies is more stringent. Note 7.

[25]For more see "Board functions and structures" in du Plessis J, McConvill J and Bagaric M, *Principles of Contemporary Corporate Governance* (Melbourne, Cambridge University Press, 2005)

[26]"Executive directors are those who, in addition to their roles as directors, hold some executive or managerial position to which… they are appointed by the board" Note 17 at 193.

[27]Corkery states: "It is difficult for the executive director to have the same objectivity and breadth of experience, because of his close involvement in the operations of the company and its hierarchy… 'non-executive', 'outside' or 'independent' directors have recently been championed as effective checks on abuses by large companies of corporate power." Corkery JF, *Directors Powers and Duties* (Longman Cheshire Pty Limited, 1987) at 4. For more see Ritchie T, "Independent Directors: Magic Bullet or Band-Aid?" (2007) *Corporate Governance eJournal Bond University at*< http://epublications.bond.edu.au/cgej/5/>. Also see Shan J and Zhang S, "An Empirical Analysis of Independent Directorship and Corporate Performance in China" in Tomasic R (ed), *Corporate Governance: Challenges for China* (China, Law Press, 2005).

[28]See Article 11 *Decision Promulgating Regulations on Corporate Governance Applicable to Companies Listed on the Stock Exchange or a Securities Trading Centre* (No 12/2007/QD/BTC) dated 13 March 2007.

3.4 Managing director

Section 57 of the *Law on Enterprises 2005* states:

> A director or general director must meet the following criteria and conditions:
>
> (a) To have full capacity for civil acts and not be prohibited from management of enterprises by this law;
>
> (b) To be an individual owning at least ten (10) per cent of the charter capital of the company, or a non-member, who has professional qualifications and practical experience in corporate management or in the main lines of business of the company, or other criteria and conditions as stipulated in the charter of the company.[29]

Section 201J of the Australian *Corporations Act 2001* states:

> The directors of the company may appoint 1 or more of themselves to the office of managing director of the company for the period, and on terms (including as to remuneration) as the directors see fit.[30]

[29]Much of this Article replicates Article 48 regarding Authorised Representatives. Both Article 57 and 48 also have a further clause regarding subsidiary companies which states: "In the case of a subsidiary company where the State share of capital contribution or State owned capital accounts for over fifty (50) per cent of the charter capital, in addition to the criteria and conditions stipulated in clause 1 of this article, the director or general director may not be the spouse, father, adopted father, mother, adopted mother, son, daughter, adopted son, adopted daughter, or sibling of the manager and the person authorised to appoint the manager of the parent company." Note 7. Article 57 applies to Limited Liability Companies of Two or More Members and Shareholding Companies. One Member Limited Liability Companies have a separate differentiating clause as part of Section 3 of Article 70 that states: (b) Not to be a related person of a Member of the Members' Council or the chairman of the company, the person authorised to directly appoint the authorised representative or the chairman of the company. The provisions for general director of Shareholding Companies are detailed in Article 116. Note 7.

[30]Note 1. Section 201J is a replaceable rule under Section 135 of the Act. As Cassidy states: "…companies are no longer required to have a constitution. Instead they can simply use the rules of internal management specified in the *Corporations Act*. Some rules are mandatory for all companies.

The managing director is the manager of the company and usually the most well known executive director. The directors of the company can confer any of the powers they exercise on the managing director. The directors can also vary or withdraw powers of the managing director.[31] Under s 203F (2) (replaceable rule) the managing director can have his or her appointment varied or revoked by the directors.[32] Under s 203F (1) (replaceable rule) the managing director will cease this role if he or she ceases to be a director.[33]

3.5 Boards and board meetings

The *Law on Enterprises 2005* sets out a number of Articles that relate directly or indirectly to the Members' Council (in relation to limited liability companies) and the Board of Management (for shareholding companies).[34] One area that has been identified as problematic is Article 108 (2) (i) that provides for the Board of Management of a shareholding company to "supervise and direct the director or general director and other management personnel in their work of conducting the daily business of the company."[35] Minh and Walker suggest that this provision along with Articles 95 and 116 of the *Law on Enterprises 2005* leave the Vietnamese vulnerable to a lack of accountability. They state:

Other rules are not, however, mandatory. These are known as 'replaceable rules'." Cassidy J, *Concise Corporations Law 5th Edition* (The Federation Press, 2006) at 88.
[31]See Section 198C (replaceable rule). Note 1.
[32]Ibid.
[33]Ibid.
[34]These include Articles 47, 50, 51, 52, 53, 54, 56, 58 and 59 for Limited Liability Companies with Two or More Members. Articles 68, 71 and 72 for One Member Limited Liability Companies and Articles 108, 109, 110, 111, 112, 113, 114, 115, 121, 122, 123, 124, 125 and 126 for Shareholding Companies. Note 7.
[35]Ibid.

> The OECD Principles of Corporate Governance and the company law of Anglo-American jurisdictions favour the role of the board of directors in the supervision and guidance of daily management tasks. However, under the *Enterprises Law 2005*, the BOM has the power to be involved directly in the company management… This means that the board can overrule the CEO who is also mandated as the decision-making individual with statutory powers to run the daily operation of the company. In this way, the statutory divisions of power and functions between the BOM and the CEO in SCs is unclear and may result in a lack of accountability.[36]

This is one view. An alternative proposition would be to suggest that the Vietnamese provisions are quite similar in their intention to those stipulated in Australia. Replaceable rule s 198A of the *Australian Corporations Act 2001* clearly outlines that:

> (1) The business of a company is to be managed by or under the direction of the directors.
>
> (2) The directors may exercise all the powers of the company except any powers that this Act or the company's constitution (if any) requires the company to exercise in general meeting.[37]

Although the wording is slightly different the overall intention is similar. As Corkery and Welling explain when referring to s 198A, "this provision or its near copies, has

[36]Minh TL and Walker G, "Corporate Governance of Listed Companies in Vietnam" (2008) Vol 20 No 2, *Bond Law Review* 118-196 at 158.
[37]Note 1.

been the base assumption of Australian corporate structures – the directors are the persons charged with the management of the company.".[38]

Vietnam could revisit this area to ensure that it does state clearly the intended meaning, but the claims by Minh and Walker on face value are not supported by comparison with the Australian provisions.

3.5. 1 *Park Hyatt Saigon case*

The *Park Hyatt Saigon* case related to the interpretation of the *Law on Enterprises 2005* Articles 51, 52 and 54. This was the first time a case had been argued pertaining to the *Law on Enterprises 2005* and as such is seen as a test case. The dispute was between United Concord International (UCI) and Radiant International Limited (RIL), being co-owners of the Park Hyatt Saigon. Grand Imperial Saigon Hotel (GISH) was a joint venture company which had a number of partners that included Saigon Construction Corporation (SCC), a Vietnamese partner, and both UCI and RIL.

The Charter for GISH was drafted under the *Foreign Investment Law 1992*, which required unanimous board decisions in relation to dissolution of the company, amendment to the charter, or replacement of the chairman of the board or the general manager of the company. Under the *Law on Enterprises 2005*, decisions could be resolved via majority, subject to certain provisions, or as set out in the company charter. This question then was: where does this leave the previously held 'unanimous decision' process? At the first trial at the Ho Chi Minh People's Court, the Court held that the original 'unanimous' resolution was valid.

[38]Corkery JF and Welling B, *Principles of Corporate Law* (Scribblers Publishing, 2008) at 173.

On appeal, the case resolved that GISH's charter remains consistent with the *Law on Enterprises 2005* as the provisions are there for parties to agree to their own terms within the Charter. It is therefore possible, but not compulsory, for parties to act by and to be bound to unanimous board decisions if they are stipulated within the company's charter. The only conflict would be if the charter specified a decision basis that was lower than that specified in the *Law on Enterprises 2005*. Thus, minority shareholders do not retain the veto rights they once enjoyed under the previous legislation that was enacted in order to protect minor shareholders (usually local Vietnamese stakeholders). However, the possibility remains that shareholders can agree to this provision if they so choose.[39]

3.5.2 Inspection committees

Reflecting the French origins of the law[40], there is an inclusion of 'inspectors' for one member limited liability companies (appointed by the owner) and an 'Inspection Committee' for shareholding companies (elected by the shareholders).[41]

Inspectors and Inspection Committees are used to verify the honesty and validity of the Members' Council or the Board of Management, the chairman and the director or general director in implementing ownership rights and managing the business of the company.[42] The law also provides for various rights to facilitate the work of inspectors

[39]For more see (Appendix B) Cong DL, *Role of Courts in Building Case Law* (unpublished paper) and the case.
[40]In France, "The Supervisory Board is responsible for supervising the management carried out by the Directorate, and can supervise and verify all operations at any time. This power includes verification of the company's accounts, but is extended to include an appreciation of the judicious management of the SA by the Directorate" Mesnooh CJ, *Law and Business in France* (Martinus Nijhoff Publishers, 1994) at 56.
[41]The limited liability company with two or more members is also required to have an inspection committee or inspectors if the company has more than 11 members. See Article 46, Note 7.
[42]See Articles 71 and 123. Ibid.

and inspection committees.[43] Equally, the law requires inspectors and members of inspection committees to have met certain criteria and conditions to be eligible to hold these positions.[44]

3.5.3 Shareholding companies

For Shareholding Companies in Vietnam there are provisions to hold general meetings of shareholders under Articles 103, 104, 105, 106 and 107.[45]

In the Australian context, the board of directors represents the company's peak body and is where the directors meet to make decisions regarding the management of the company. The Australian *Corporations Act 2001* s 198A (1) (replaceable rule) provides the authority for the board, stating:

> [Management by directors] The business of the company is to be managed by or under the direction of the directors.[46]

Section 198D (1) also allows the directors the discretion to delegate their powers to a committee of directors, a director, an employee or another person in certain conditions.[47]

One area of contention within companies is the division of power between the board of directors and the general meeting of shareholders.

[43]See Articles 71 and 123. Ibid.
[44]See Articles 71 and 122. Ibid.
[45]Note 7.
[46]Note 1.
[47]Note 1.

3.6 Company secretary

The role of the Vietnamese company secretary is not included in the *Law on Enterprises 2005.* However, the *Model Charter* does include a provision for the secretary of the company for listed companies in Article 32.[48]

Section 204A of the Australian *Corporations Act 2001* outlines that it is not a requirement for proprietary companies[49] to have a secretary, although they may appoint one or more.[50] If one or more secretaries are appointed then one must reside in Australia.[51] The secretary is appointed by the board pursuant to section 204D of the *Corporations Act 2001*.[52] The appointment of the secretary must be notified to ASIC within 28 days under s 205B(1)[53]. Section 300(10)(d) also requires the qualifications and experience of each company secretary to be included in the annual report for public companies.[54]

The role of company secretaries is an important one. They are responsible for the company's obligations with ASIC regarding lodgement of particular information and the company's registered office. Other responsibilities of secretaries are outlined in s 188 of the Australian *Corporations Act 2001*.[55]

[48] National Assembly, Socialist Republic of Vietnam, *Model Charter 2007*
[49]Public companies are required to have at least one secretary who must reside in Australia under section 204A(2). Note 1.
[50]Ibid.
[51]Section 204A(1). Ibid.
[52]Ibid.
[53]Ibid.
[54]Ibid.
[55]Note 1. Section 188(2) outlines that the responsibilities for secretaries are to be carried out by director(s) in the event that a proprietary company does not appoint a secretary. Note 1.

A secretary has implied authority to act on behalf of the company in administrative matters.[56] However, as outlined in *Northside Developments Pty Ltd v Registrar-General,*[57] the implied authority is not enough for others to forego proper due diligence in matters of gravity.

3.7 Conclusion

The Vietnamese definition of a director fails to provide for the possibilities left open by *de facto* directors.[58] Section 198A of the *Corporations Act 2001* comes closest to reflecting the Vietnamese definition of a director.

Section 198A states:

> (1)[Management by directors] The business of a company is to be managed by or under the direction of the directors[59]

[56]Under section 204E, acts by the company secretary are effective even though that person's appointment is invalid. Ibid.

[57]Brennan J stated: "Gerard Sturgess was not appointed as secretary of the company, though a return was lodged with the Corporate Affairs Commission purporting to state that he had been so appointed. It is not necessary to examine whether, if the only irregularity in the exercise of the instrument of mortgage had been the signature of Gerard Sturgess instead of the person earlier appointed as secretary of the company, the lodging of the return or the company's failure to correct it may have been sufficient to estop the company from denying that Gerard Sturgess possessed the authority of the secretary to countersign. The indoor management rule was displaced by more substantial considerations. The transaction was such that Barclays ought to have made an inquiry of the board of Northside to ascertain whether the board had authorized the execution of the instrument or mortgage. Had that inquiry been made a negative answer would have been inevitable. At the trial before Young J. no evidence was led of the making of any inquiry. Northside was therefore not estopped from showing that the instrument of mortgage was executed without its authority and was not its instrument." *Northside Developments Pty Ltd v Registrar-General* (1990) HCA 32; (1990) 170 CLR 146 at paragraph 29.

[58]In this context the term *de facto* directors includes 'shadow directors'. As Corkery and Welling state: "We sometimes use the term 'shadow director' for a person in accordance with whose instructions or wishes the directors are accustomed to act, as the s9 definition of 'director' puts it. The term de facto director is broader and is to be preferred." Corkery JF and Welling B, *Principles of Corporate Law* (Scribblers Publishing, 2008) at 143.

However, s 198A of the Australian *Corporations Act 2001* refers to the powers of a director, as opposed to the definition of a director. There is a difference between what a director is and what a director does. This distinction is not made clear in the Vietnamese definition of a director. As a result, *de facto* directors represent a potential problem for the Vietnamese definition. This is especially problematic due to the possibility (in Australia) for *de facto* directors to bind the company, in certain circumstances.[60] Given, the broad Vietnamese definition it remains arguable that a more specific definition encompassing *de facto* directors is not necessary provided the arguments pertaining to the possibilities of *de facto* directors binding the company are understood and heard.

The *Corporations Act 2001* and the *Law on Enterprises* both stipulate specific requirements for individual eligibility for directors.[61] Neither piece of legislation refers directly to executive or non-executive directors or specifies a requirement for non-executive directors to be represented on boards.

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[59]Note 1.

[60]This relates to Section 201M of the *Corporations Act 2001* that states: "(1)[Act effective despite invalid appointment] An act done by a director is effective even if their appointment, or the continuance of their appointment, is invalid because the company or director did not comply with the company's constitution (if any) or any provision of this Act." *Corporations Act 2001* (Cth) of Australia. Corkery and Welling in relation to this section also state: "In other words, a de facto director can, in certain circumstances, bind the company." Corkery JF and Welling B, *Principles of Corporate Law* (Scribblers Publishing, 2008) at 146.

[61]Section 201B of the *Corporations Act 2001* states: "(1) [Minimum age requirement] Only an individual who is at least 18 may be appointed as a director of a company. (2)[Appointment of disqualified person] A person who is disqualified from managing corporations under Part 2D.6 may only be appointed as director of a company if the appointment is made with permission granted by ASIC under section 206F or leave granted by the Court under section 206G." *Corporations Act 2001* (Cth) of Australia. Article 48 on Authorized representatives sets out the relevant criteria for the *Law on Enterprises*. Note 7.

There are a number of similarities between Vietnam and Australia in relation to the calling of board meetings,[62] minute taking and recording,[63] and the authority of the board (or Members' Council in the case of Vietnam).[64] This may assist Vietnam when legal issues on these matters come before the Courts for adjudication.

Significant differences also exist. The Vietnamese inclusion of inspectors and inspection committees does not apply in Australia. However, Australia has ASIC to ensure compliance with the various regulations. Although Vietnam has the SSC, it is largely ineffective for enforcement or compliance purposes.

The Australian ability for directors to delegate their duties is not applicable in Vietnam (except in the circumstance of the legal representative leaving Vietnam for thirty days or more). Vietnam should consider the relative merits of this facility and evolve its own laws accordingly.[65]

[62]In Vietnam, Article 50 (Limited Liability Companies of Two or More Members), Article 68 (One Member Limited Liability Companies) and 122 (Shareholding Companies). National Assembly, Socialist Republic of Vietnam, *Law on Enterprises* 29 November 2005. In Australia, section 248. Note 1.
[63]In Vietnam, Article 53 (Limited Liability Companies of Two or More Members), Article 68 (One Member Limited Liability Companies) and Article 113 (Shareholding Companies). National Assembly, Socialist Republic of Vietnam, *Law on Enterprises* 29 November 2005. In Australia, section 251A of the *Corporations Act 2001*. Note 1.
[64]In Vietnam, Article 47 (Limited Liability Companies of Two or More Members), Article 68 (One Member Limited Liability Companies) and Article 108 (Shareholding Companies). Note 7. In Australia, section 198A (replaceable rule). Note1.
[65]In Vietnam Article 46 (Limited Liability Companied of Two or More Members) and Article 67(One Member Limited Liability Companies). Note 7.

Chapter Four

Appointment and Removal of Directors

4.1 Introduction

Part of a good corporate governance framework is a fair and equitable process that includes checks and balances for the appointment and removal of directors.[1] The appointment and removal of directors is a major control mechanism for shareholders in the power matrix of the corporation.

4.2 The appointment of directors

Appointment of directors is critical in assisting shareholders with addressing the agency problem. Shareholders want to be sure that suitably competent and qualified directors are chosen to run their company. This does not mean that shareholders necessarily need to be part of the appointment process themselves, only that they have ultimate control and are satisfied with the appointment processes in place.[2]

Given the responsibilities involved in being a director, a transparent process of appointment also helps alleviate the concerns of both directors and shareholders about how directors are appointed.

[1]See Hansmann Hand Kraakman R, "Agency Problems and Legal Strategies" in Kraakman RR et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press, 2004)

[2]In Australia "the majority of votes [by shareholders] elects the directors" Corkery JF and Welling B, *Principles of Corporate Law* (Scribblers Publishing, 2008) at 149. In England "The Act itself says little about the means of appointing directors, leaving this to the articles of association. Its main concern is to give publicity to those who are appointed rather than to regulate the appointment process." See Davies PL (ed), *Principles of Modern Company Law 8th Edition* (Sweet and Maxwell, 2008) at 378.

The *Law on Enterprises 2005* sets out specific people who cannot be appointed as company directors in Vietnam. These include State bodies, officials and employees of the State, various people related to the armed forces, people serving prison sentences and those prohibited by the Court.[3]

Article 48 of the Vietnamese *Law of Enterprises 2005* outlines the requirements for appointment of authorised representatives for limited liability companies with two or more members:

> 1. The appointment of an authorised representative must be in writing, must be notified to the company and the business registration body within seven days from the date of appointment. The notice must contain the following main contents:
>
> (a) Name, address of the head office, nationality, number and date of the decision on establishment or the business of registration;
>
> (b) The ratio of capital contribution, number and date of the capital contribution certificate;

[3]Article 13 (2) "The following organizations and individuals shall not have the right to establish and manage enterprises in Vietnam: (a) State bodies, units of people's armed forces of Vietnam using State assets to establish business enterprises to make profits for their own bodies or units; (b) State officials and employees in accordance with the laws on State officials and employees; (c) Officers, non-commissioned officers, career servicemen, national defence workers in bodies and units of the People's Army of Vietnam; officers, career non-commissioned officers in bodies and units of the People's Police; (d) Management personnel, professional management personnel in enterprises with one hundred (100) per cent State owned capital, except for those appointed to be authorised representatives to manage the State's share of capital contribution in other enterprises; (dd) Minors; persons whose capacity for civil acts is restricted or lost; (e) Persons in the process of serving prison sentences or who are prohibited but a Court from conducting business; (g) Other cases as stipulated by the laws on bankruptcy." National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005*. It is not clear what is meant by "persons whose capacity for civil acts is restricted or lost" or how this might be interpreted by the Courts.

(c) Full name, permanent address, nationality, number of identity card, passport or other legal personal identification of the appointed authorised representative;

(d) Period of authorization;

(dd) Full name and signature of the legal representative of the member and of the authorized representative of the member.

The replacement of an authorized representative must be notified in writing to the company and the business registration body within seven working days from the date of decision and shall take effect from the date the company is notified.[4]

Some other restrictions apply in relation to the appointment of authorised representatives in Vietnam. For limited liability companies of two or more members

[4]Ibid. There is a second part to this article that outlines the criteria and conditions that an authorised representative must meet – these have been covered in Chapter one. Article 47 refers to organisations as members in limited liability companies of two or more members and states: "Where a member is an organization, such member shall appoint its authorised representative to be on the Members' Council." National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005*. For one member limited liability companies Article 67 states: "The company owner shall appoint one or several persons as authorised representatives for a term of five years or less in order to exercise its rights and obligations in accordance with this Law and the relevant laws." National Assembly, Socialist Republic of Vietnam, *Law on Enterprises* 29 November 2005. For shareholding companies Article 109 states: "1. The Board of Management shall have at least three members, and not more than eleven (11) members, if the charter of the company does not stipulate otherwise. The members of the Board of Management must reside permanently in Vietnam as stipulated in the charter of the company. The term of the Board of Management shall be five (5) years. 2. The term of office of members of the Board of Management shall not exceed three years, and members of the Board of Management may be re-elected with an unlimited term. The Board of Management of a term which has recently expired shall continue to operate until a new Board of Management is elected and takes over the management work." Article 115 also states: "3. Where the number of members of the Board of Management is reduced to less than one third (1/3) of the number stipulated in the charter of the company, the Board of Management shall convene a General Meeting of Shareholders within sixty (60) days from the date the number of members [of the Board of Management] is reduce to less than one third (1/3), to elect additional members of the Board of Management." National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005*. For one member limited liability companies there is no specification on the number of authorised representatives that can be appointed. For these companies as already outlined, inspectors are mandatory. Article 71 National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005*.

the Members' Council comprises all members and may not exceed fifty (50).[5] If there are more than eleven (11) members an inspection committee must be established.[6] In shareholding companies the Board of Management must have at least three members and not more than eleven (11), if not otherwise stipulated in the company's charter. The members of the board must reside permanently in Vietnam.[7]

In Australia under s 120(1) the first directors are appointed upon or by the company's registration. A person becomes a director upon registration of the company provided they consent.[8] From then, directors may also be appointed by way of a resolution of the general meeting pursuant to s 201G (replaceable rule),[9] or by other directors under s 201H (replaceable rule).[10] With the approval of the other directors, a director may appoint an alternate for a specified period to carry out some or all of the director's duties under s 201K (replaceable rule).[11]

The replaceable rule s 201J sets out the provisions for the company directors to appoint one or more of themselves to the office of managing director for the period on

[5]Article 38 (1(a)) and Article 47 (1). Ibid.
[6]For a Members' Council with fewer than eleven (11) members an inspection committee may be formed in accordance with the management needs of the company. Article 46. Ibid.
[7]Article 109 National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005*.
[8]See *Corporations Act 2001* (Cth) of Australia. Consent to be a director is outlined in section 201D.
[9]Ibid.
[10]Ibid. This provision has extra hurdles: for proprietary companies section 201H(2) states: "If a person is appointed under this section as a director of a proprietary company, the company must confirm the appointment by resolution within 2 months after the appointment is made. If the appointment is not confirmed, the person ceases to be a director of the company at the end of those 2 months." For public companies section 201H(3) states: "If a person is appointed by other directors as a director of a public company, the company must confirm the appointment by resolution at the company's next AGM. If the appointment is not confirmed, the person ceases to be a director of the company at the end of the AGM." Ibid. In relation to a resolution for appointment of public company directors, section 201E states that the resolution can not appoint 2 or more directors unless: "the meeting has resolved that the appointments or confirmations may be voted on together; and no votes were cast against the resolution" Ibid.
[11]Ibid.

terms they see fit.[12] They may also confer on a managing director any of their powers.[13] They can also revoke or vary the delegation of powers to the managing director under s 198C (2).[14]

Under replaceable rule s 198D directors can delegate their powers to a committee of directors, a director, employee of the company, or another person. This delegated power is then exercised by the delegate, as if the directors had exercised it, and carries the same effect.[15]

Further provisions stipulated for the appointment of directors in Australia deal with residency of directors and specify a minimum age and minimum numbers of directors for large and small companies.

1. Minimum numbers (section 201A)
    a. Proprietary companies must have at least 1 director who ordinarily resides in Australia
    b. Public companies must have at least 3 directors (not counting alternate directors). At least 2 directors must ordinarily reside in Australia.[16]
2. Minimum age of 18 (section 201B(1))[17]

[12]Ibid.
[13]s198C (1). Ibid.
[14]Ibid.
[15]s198D(3). Ibid.
[16]Ibid.
[17]Ibid.

3. Specific permission to be granted by ASIC under section 206F or leave of the Court under section 206G for appointment of disqualified persons under Part 2D.6. (section 201B(2))[18]

Consistent with international practice, directors in Australia are not required to have any minimum standards of qualification or training, nor are they required to hold shares, unless stipulated by the company's constitution.[19] A minimum share ownership may be required by the constitution, as a sign or gesture of commitment by the director to the company's fortune.

The Vietnamese *Law on Enterprises 2005* provisions differ from the Australian provisions in many respects. In Vietnam, only the general meeting has the power to appoint directors.[20] This may provide difficulties in circumstances where the Court needs to intervene, such as in situations of disputes over the lawful approval of the board. Unlike Australia, there is no requirement in Vietnam for directors to provide their consent to being appointed. This creates the possibility for a person being made a director without his or her knowledge.

The Vietnamese legislation requires the chief operating officer (CEO)[21] to be:

> An individual owning at least ten (10) per cent of the charter capital of the company, or a non-member, who has professional qualifications

[18]Ibid.
[19]Note 2.
[20]Note 4.
[21]The term CEO is not used in the *Law on Enterprises 2005*, as noted in Chapter One. Ibid.

and practical experience in corporate management or in the main lines of business of the company[22]

This provision seems to suggest that a shareholding in the company is some safeguard, or at least deemed to be equivalent to appropriate qualifications and experience, for the members who, in the case of the limited liability company with two or more members, are all participants in the Members Council.[23] Thus, the CEO is either a member holding ten per cent of the charter capital or a non-member (therefore not part of the Member's Council) who holds 'professional qualifications and practical experience in corporate management or in the main lines of business of the company'. What constitutes appropriate qualifications or practical experience is not defined. One may disagree with Bui, who suggests that the Vietnamese "Law appears to prefer a manager being a shareholder than a non-shareholder".[24] The Law provides for two different possibilities without specifying a preference.

There is significance in the directors having 'some skin in the game'. The French require all of their directors to be shareholders of the corporation and if, at the time of their appointment or during the time of their office, they do not hold the required shareholding, they are deemed to have resigned, unless they rectify the situation within three months.[25] Furthermore, the French provisions for directors stipulate, "In the absence of an express provision in the statutes, the numbers of directors over the age of seventy may not exceed one third of the directors in office."[26]

[22]Ibid.
[23]See Article 47 *Law on Enterprises 2005*. Ibid.
[24]See Bui HX, "Corporate Governance in Vietnamese Company Law: A Proposal For Reform" (unpublished Phd thesis) La Trobe University 2007 at 231.
[25]See Article L. 225-25. *The French Commercial Code 2005*.
[26]See Article L. 225-19. Ibid.

The Vietnamese laws do not stipulate a minimum or a maximum age, but they do require certain criteria and conditions that would make it difficult for anyone under 18 to comply.[27] There is no provision for specific permission to be granted for those prohibited from management of enterprises by law.[28]

The French further stipulate with respect to executive directors that:

> Any appointment made in breach of these provisions of the present paragraph is null and void. This invalidity does not affect the validity of any decisions in which the irregularly appointed director has participated.[29]

This relates to the previous discussion about the definitions of directors, in Chapter Three, which is reinforced in the French provisions for appointment of directors. This provides a further possibility for the Vietnamese, to consider strengthening their provisions by stipulating what occurs in the event that a director is irregularly appointed.

4.3 The removal of directors

Removal (like appointment) of directors is important for shareholders in addressing the agency problem. Shareholders want to be able to remove directors who are not

[27]These criteria were outlined in Chapter One. See Article 48(2) and 57 National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005*. Also one of the conditions required to be a director stipulated by the law is "having full capacity for civil act". Under the *Civil Code*, a person who is considered as having "full capacity for civil act" is the person whose age is 18 or above and who must not have had circumstances of losing "civil capacity" (such as being mentally ill). See Articles 18, 19, 20, 22. Note 4.
[28]See Article 48(2) and 57. Ibid.
[29]See Article L. 225-22. Note 25.

acting in the best interests of the company or who are less than diligent or competent. Equally, directors want to have some certainty that they cannot be removed unfairly, although they accept that shareholders can remove them without cause in most jurisdictions.

French directors have a fixed term set by statute, "but [it] may not exceed six years where they are appointed by a general meeting."[30]

In Vietnam, although the period or term of office is specified for some of the company office holders,[31] it appears to be either open to discretion or set by the general meeting in relation to other office holders. Article 48 (d) of the *Law on Enterprises 2005* simply asks that the "period of authorisation" be notified.[32] However, even though they may be appointed for five years, directors can be dismissed by the shareholders at the general meeting, just as they can in all other jurisdictions considered in this study.[33] There seems to be some inconsistency within the *Law on Enterprises 2005* on office terms.[34]

[30]See Article L. 225-18. Ibid. It is not possible to seek re-election unless otherwise specified.
[31]The term of the Chairman of the Members' Council in limited liability companies with two or more members is stated in Article 49 (3): "shall not exceed five years. The chairman of the Members' Council may be re-elected for an unrestricted number of terms." Note 4.
[32]Ibid.
[33]For one member limited liability companies in Vietnam Article 67 (2) states that: 'The owner shall have the right to replace an authorised representative at any time.' Article 67 (1) stipulates for one member limited liability companies that "The company shall appoint one or several persons as authorised representatives for a term of five years or less…". The Chairman of the Members' Council of a one member limited liability company is appointed under Article 68 (3) which refers to the terms that exist for the Chairman of the Members' Council of limited liability companies with two or more members in Article 49. Article 70 (1) specifies that the CEO of the one member limited liability company is appointed "for a term not exceeding five years." Similarly Article 71 provides for the appointment of inspectors "for a term not exceeding three years." In shareholding companies the Board of Management under Article 109 (1) are appointed for a term of 5 years. The CEO in shareholding companies is appointed for not more than 5 years, with an unlimited number of re-appointments as specified in Article 116 (2). Also the Inspection Committee of shareholding companies is appointed for not more 5 years with unlimited re-appointment as stipulated in Article 121 (1). Note 4.
[34]For example, the terms for the appointment of the CEO in both one member limited liability companies and shareholding companies.

In the Vietnamese *Law on Enterprises 2005*, Article 47(dd) refers to the Members' Council's ability to remove the chairman of the Members' Council.[35] For shareholding companies Article 115 states:

1. A member of the Board of Management shall be removed and dismissed in the following cases:
    a. Loss of criteria and conditions stipulated in article 110 of this law;
    b. Not participating in activities of the Board of Management within (6) consecutive months, except for force majeure cases;
    c. Resignation;
    d. Other cases stipulated in the charter of the company

2. In addition to cases stipulated in clause 1 of this article, members of the Board of Management may be dismissed at any time pursuant to a resolution of the General Meeting of Shareholders.
3. Where the number of members of the Board of Management is reduced to less than one third (1/3) of the number stipulated in the charter of the company, the Board of Management shall convene a General Meeting of Shareholders within sixty (60) days from the date of the number of members [of the Board of Management] is reduced to less than one third (1/3), to elect additional members of the Board of Management.

[35]This is for limited liability companies with two or more members. Apart from this provision the Law on Enterprises is silent regarding removal of directors from limited liability companies. Note 4.

> In other cases, the next General Meeting of Shareholders shall elect new members of the Board of Management to replace members of the Board of Management who have been removed or dismissed.[36]

In Australia under s 203A (replaceable rule) of the *Corporations Act 2001* a director may resign by giving written notice to the company.[37] Persons cease to be a director under s 203B if they are disqualified from managing a company under Part 2D.6 unless a Court or ASIC allows them to manage the company.[38]

Members can remove directors under s 203C (replaceable rule) in proprietary companies[39] and s 203D for public companies.[40]

It is an important rule that directors cannot 'gang up' on outspoken or independently minded fellow directors. Directors cannot be removed by other directors in public companies.[41] A person ceases to be managing director if he or she ceases to be a director under s 203F (replaceable rule).[42] However, directors may revoke or vary an appointment of managing director.[43]

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[36]Ibid.
[37]Note 8.
[38]Ibid.
[39]Ibid.
[40]Ibid. This section states: "(1)A public company may by resolution remove a director from office despite anything in: (a) the company's constitution (if any); or (b) an agreement between the company and the director; or (c) an agreement between any or all members of the company and the director. If the director was appointed to represent the interests of particular shareholders or debenture holders, the resolution to remove the director does not take effect until a replacement to represent their interests has been appointed." Ibid. For more see McConvill J and Holland E, "'Pre-Nuptial Agreements' For Removing Directors in Australia – Are They a Valid Part of the Marriage Between Shareholders and the Board?" 2006 *Journal of Business Law* 204.
[41]See s 203E Ibid.
[42]Ibid.
[43]Section 203F(2) (replaceable rule). Ibid.

The consequence of this rule is that companies can remove their managing director by removing them as director. This raises many issues relating to the company's power and rights to remove a director.[44] These issues ultimately revolve around the specific terms of the service contract with the managing director, the company's constitution, and the relationship between these two documents.[45]

4.4 Disqualification from office and from managing companies

Removing and quarantining defaulting directors is an important aspect of control. Under s 206B (3) and (4) of the Australian *Corporations Act 2001* an undischarged bankrupt is prohibited from managing a company; this includes those who enter into a deed of arrangement or composition under Pt X of the *Bankruptcy Act 1966*.[46]

Disqualification from office can also apply in Australia if a person is convicted of an offence.[47] The Court also holds a discretionary power of disqualification for repeated contraventions of the Act.[48] A further discretionary power that the Court holds is for

[44]See *Bailey v New South Wales Medical Defence Union Ltd* (1995) 18 ACSR 521, *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701 and *Allen v Gold Reefs of West Africa* [1900] 1 Ch 656.

[45]s140(1) provides that the company's constitution and the replaceable rules that apply to it are expressed to have effect as a contract between the company, members and directors, and between members. For more see *Read v Astoria (Streatham) Ltd* [1952] WN 185 Chancery Division

[46]"Automatic disqualification: Bankruptcy or personal insolvency agreement (3) A person is disqualified from managing corporations if the person is an undischarged bankrupt under the law of Australia, its external territories or another country. (4) A person is disqualified from managing corporations if: (a) the person has executed a personal insolvency agreement under (i) Part X of the *Bankruptcy Act 1966* ; or (ii) a similar law of an external Territory or a foreign country; and (b) the terms of the agreement have not been fully complied with." Baxt R and Harris J, *Corporations Legislation 2008* (Sydney, Thomson Legal and Regulatory, 2008) at 190. In Vietnam, Article 13 (g) of the *Law on Enterprises 2005* stipulates that the laws on bankruptcy also apply in determining the right to establish a business. Note 4.

[47]Note 8.

[48]Ibid.

disqualifying directors involved in managing companies that have failed.[49] Moreover, ASIC has powers of disqualification in certain circumstances.[50]

In Vietnam, Article 13 of the *Law on Enterprises 2005* stipulates that persons "serving prison sentences or who are prohibited by the Court from conducting business" are denied the right to establish a business.[51] The circumstances that are required for the Court to prohibit a person from pursuing a business are not specified. The obvious causes, such as breach of directors' duties or other management failures would surely apply. Unlike Australia, in Vietnam there is no discretionary power granted enabling a third party like ASIC to either allow or disqualify directors. The regulator is the obvious party to seek disqualification of a director.

The Chinese *Company Law 2005* lists persons who are disqualified from office. Appointment of someone whose name appears on the list is considered void.[52]

4.5 Restrictions on certain persons managing companies

The only restrictions placed on persons managing companies in Vietnam are those previously outlined in the *Law on Enterprises 2005* Article 13 and Article 48 (2) relating to authorised representatives.[53] There is no provision for the automatic disqualification of a person as a director on breach of management provisions in the statute or on the occurrence of insolvency. It would be appropriate for Vietnam to

[49]Ibid.
[50]Ibid.
[51]It can be argued that being denied the right to establish a business is different from being denied the right to continue as a director in an existing business. Presumably the Vietnamese provisions would be interpreted in such a way as to include the latter.
[52]People's Republic of China *Company Law 2005*
[53]Note 4.

adopt some filters (such as s 206B of the Australian *Corporations Act 2001*) to prevent unsatisfactory persons remaining in control of companies.

Section 206B of the *Corporations Act 2001* refers to automatic disqualification and states:

> A person becomes disqualified from managing corporations if the person:
>
> (a) is convicted on indictment of an offence that:
>
> (i) concerns the making, or participation in making, of decisions that affect the whole or a substantial part of the business of the corporation; or
>
> (ii) concerns an act that has the capacity to affect significantly the corporation's financial standing: or
>
> (b) is convicted of an offence that:
>
> (i) is a contravention of this Act and is punishable by imprisonment for a period greater than 12 months; or
>
> (ii) involves dishonesty and is punishable by imprisonment for at least 3 months; or
>
> (c) is convicted of an offence against the law of a foreign country that is punishable by imprisonment for a period greater than 12 months.[54]

[54]Note 8.

4.6 Termination

In Australia, directors can have their office terminated via resignation, removal or retirement. Removal has already been discussed above. The company's constitution or the director's contract may stipulate provisions relevant to the director's termination.[55] Notwithstanding these measures, directors can resign from office at any time provided they give the appropriate notice. Acceptance by the company is not a requirement for the director's resignation to be valid, unless otherwise stated in the constitution or director's contract.[56]

The director may also give notice to ASIC of the resignation, which must be accompanied by a copy of the letter of resignation provided to the company by the director.[57] The company must also notify ASIC.[58]

Retirement is often outlined in the company's constitution. This may be in the form of rotation. As with resignation, a director may provide ASIC with notice of retirement and the company must notify ASIC of the change of directors.[59]

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[55]"In proprietary companies a replaceable rule confers power to remove a director from office and to appoint another person in their place without the protections afforded to directors of public companies under s203D: s203. The constitutions of many public as well as proprietary companies contain such a provision. The question accordingly arises as to whether a public company may choose to exercise the removal power in its constitution rather than following s203D. In *Holmes v Life Funds of Australia Pty* a dispute arose over the ruling of a chair at a general meeting of a public company in relation to a motion that the present directors be removed from office…The Court held that the chair's ruling was wrong and that s203D was not intended to provide a complete code for the removal of directors. Accordingly, if members choose to proceed to remove a director under the procedure contained in the constitution, s203D has no application. Alternatively, however they might choose to proceed under s203D in which case the constitutional provision for removal has no operation. The two provisions therefore create "concurrent and alternative procedures" by which director removal may be effected at the option of shareholders." Redmond P, *Companies and Securities Law 4th Edition* (Sydney, Lawbook Co, 2005) at 294 and 295. See also *Holmes v Life Funds of Australia Pty* [1971] 1 NSWLR 860, *Bushell v Faith* [1970] AC 1099, *Link Agricultural Pty Ltd v Shanahan* [1999] 1 VR 466, *Allied Mining and Processing Ltd v Boldbow Pty Ltd* [2002] WASC 195.
[56]Note 2 at 157.
[57]Note 8.
[58]Ibid.
[59]Ibid.

Even though directors may appear to have been validly removed in accordance with the various instruments outlined, they still retain the possibility of claiming their removal was oppressive or unjust[60] under s 232 or s 461(1) of the *Corporations Act 2001*.[61]

In Vietnam Article 115 (1C) refers to resignation but nothing is specified in terms of what is required either by the member or the company. As in other jurisdictions, the CEO of a Vietnamese company is employed under a contract subject to Vietnamese labour laws.[62]

There are no provisions in the Vietnamese *Law on Enterprises 2005* for directors to claim unjust or oppressive removal.

4.7 Conclusion

The *Law on Enterprises 2005* could be further enhanced by some additional provisions to complement the existing measures in place for appointment and removal of directors.

[60]See *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 per Lord Wilberforce at 380 "The law of companies recognises the right, in many ways, to remove a director from the board. Section 184 of the Companies Act 1948 (UK) confers this right upon the company in general meeting whatever the articles may say. Some articles may prescribe other methods: for example, a governing director may have the power to remove: *Re Wondoflex Textiles Pty Ltd* [1951] VLR 458. And quite apart form removal powers, there are normally provisions for retirement of directors by rotation so that their re-election can be opposed and defeated by a majority, or even by a casting vote. In all these ways a particular director-member may find himself no longer a director, through removal, or non re-election: this situation he must normally accept, unless he undertakes the burden of proving fraud or mala fides. The just and equitable provision nevertheless comes to his assistance if he can point to, and prove, some special underlying obligation of this fellow member(s) in good faith, or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that, if broken, the conclusion must be that the association must be dissolved." See also *Aloridge Pty Ltd (prov liq apptd) v West Australian Gem Explorers Pty Ltd (in liq)* (1966) 22 ACSR 484, *Gambotto v WCP Ltd (1995) 13 ACLC 342* and *NRMA Ltd v Snodgrass (2001) 19 ACLC 769*.

[61]Ibid.

[62]Note 4.

There seems no reason not to require the consent of directors prior to confirming their appointment. Surely it is in both the shareholders' and the directors' best interests, not to mention the best interests of the company, to ensure that directors consent to appointment. This is a relatively simple addition that adds clarity and certainty in this area of the appointment provisions.

Similarly, there seems no logical benefit in specifying the terms of appointment for CEO in some company structures but not others. Again, this is a minor amendment that would add consistency.

Consideration could be given to clarifying the procedural requirements for resignation. This could include written notice to the regulator that has also been sent to the company.

Further consideration could be given to providing additional powers, either to the Courts or to a third party similar to the Australian ASIC, for appointing directors in particular circumstances that will allow the company to operate properly.

Disqualification provisions specifying the defaults and management wrongs that will lead to disqualification would enhance corporate governance by ridding the corporate sector of defaulting directors and signalling what aspects of managerial behaviour must attract censure in the regulatory system.

Chapter Five

Meetings

5.1 Introduction

The most powerful organs of a corporation are its board of directors, the general meeting and the managing director.[1] Thus the two most important meetings within a company are board meetings and the general meeting. This applies in Vietnam as in all other corporate governance environments.

The 'owners' of the company, the shareholders, use the general meeting to ensure that their interests are preserved. Some matters of importance, such as appointment and removal of directors, must be voted on by the general meeting.

Through their articles, companies settle matters relating to the structure and administration of the company. The general meeting must make any changes to the articles. At law, the shareholders decide on the nature and details of their relationship with the directors and how that relationship will be conducted.

The board of directors is invariably made responsible for managing the company and the articles detail any matters that require the support of the general meeting. It is uncommon, albeit possible, for the general meeting to severely restrict the board of

[1] "…there are two main organs of a company in which managerial powers are vested. They are the members in a general meeting, and the board of directors. Each organ has full power or authority to perform the acts, which are specifically allocated to it, either by the company's constitution or the Corporations Act. As a general rule, neither organ can override the power or authority of the other…As a further general rule, most corporations vest all managerial power of the company in the board of directors." Donnelly R, and Harris J (eds), *Corporations Law* (Reed International Books, 2003) at 50.

directors in the scope of its management, but generally the constitution echoes the statutes, which specify that the board of directors is to 'manage' the company.

The general meeting most often retains the right to determine such matters as the directors' remuneration (the provisions in the Act are often changed in the company's constitution), election of directors, directors' shareholdings and dividend payments.

It is common sense that the day-to-day ability to manage a company would be become impractical if directors constantly had to seek the approval of the general meeting on management matters. The board of directors usually meets on a regular basis to oversee the day-to-day management of the company.

On the other hand the shareholders, as owners of the company, require some assurances that the management of the company is within acceptable parameters, especially with the inherent agency problems associated with any relationship between shareholders and directors in the corporate context.

Directors usually have the opportunity to delegate their powers either to committees of directors or to the managing director. Indeed, in the Australian statute such delegation is specifically mandated in s 198D.[2] Delegation of powers by directors does not release them from their responsibilities. This is often a problematic aspect of company management, especially within the modern corporation. Many directors do not have the time required to be familiar with all the complexities of modern

[2] *Corporations Act 2001* (Cth) of Australia.

company management, and as a result they delegate their powers to the managing director or other non-board executives. This can pose problems for the directors as the law is not always in line with the practical realities of management.

This situation further illustrates the agency problem that is at the heart of all corporate entities. The shareholders trust the directors to represent the company's best interest and therefore the interests of the shareholders (owners of the company). When directors fail to do this, shareholders can resort to the law for remedies.

5.2 Directors and directors' meetings

In Vietnam the *Law on Enterprises 2005* outlines different management approaches for each of the four types of company represented in the legislation. Shareholding companies have a board of management, which reflects the widely held practice of management structure in other jurisdictions.[3] Partnerships also reflect other jurisdictions through the use of a partners' council for day-to-day management.[4]

The Vietnamese limited liability companies of two or more members, however, adopt a different, and potentially problematic mechanism for management. The use of a members' council to manage the day-to-day activities of the company could be argued to conflict with good governance practice and this problem is highlighted in meetings.[5] Bui argues against this form of governance as follows:

[3]Article 108, National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005.*
[4]Article 135. Ibid.
[5]Because of the different 'agency problems' the roles and purposes of meetings are different between directors and members. Members' meetings are designed to combat the agency problems between the members and the directors and between members. Members need to satisfy themselves that the directors are making decisions in the best interests of the company, and they need to do this with a view to ensuring that all members have equitable access to decision making. Meetings for directors are for the purposes of facilitating the management of the company. The provisions for directors meetings are designed to allow directors the greatest opportunity to fairly and equitably fulfil their duties to the

> The Enterprise Law 2005 imposes duties of a CEO on every member of the MC of the multiple-shareholder LLC… the MC is the shareholders' meeting of a multiple-shareholder LLC that consists of all natural-person shareholders. It is quite inappropriate for the 2005 Law to impose duties of loyalty, good faith, care and diligence on natural-person shareholders. In this way, the 2005 Law appears to treat all natural-person shareholders of an LLC as company directors/managers, and not distinguish between roles and powers of shareholders and managers.[6]

Bui is referring to Article 46 that stipulates that the Members' Council will manage the company.[7] Article 47 states that:

> [the] Members' Council will comprise of *all* members and shall be the highest decision-making authority of the company.[8]

This mechanism is more akin to the general meeting than to the board of directors of limited liability companies in other jurisdictions. Given the mention of day-to-day

company. Meetings for members constitute the highest authority in the company, acting as a 'counterbalance' to the directors, and although some procedural rules are similar, the goals, objectives and purposes for members' meetings are different from those of directors.

[6]Bui HX, "Corporate Governance in Vietnamese Company Law: A Proposal For Reform" (unpublished PhD thesis) La Trobe University 2007 at 245.

[7]Note 3.

[8]Ibid. Article 47 of the *Law on Enterprises 2005* is exactly the same as the previous provision, Article 35 in the *Law on Enterprises 1999*. The requirement for all members to be part of the members' council is probably an attempt to protect minor members. This is further illustrated with the amendment in the provisions for decision making in the *Law on Enterprises 2005*, requiring decisions to be passed by majority representing at least 65% of the capital of attending members in Article 52. This has changed from the previous Article 39 of the *Law on Enterprises 1999* which provided for resolutions to be passed by a majority representing 51% of the capital of the attending members.

management of the company it would seem that it is meant to be the equivalent of a board of directors. However, as the meeting is comprised of *all* members it actually represents the general meeting.[9] The potential problem, as depicted by Bui, is compounded in Article 56 which states that:

> (1) A member of the Members' Council, the director or general director of the company shall have the following obligations:
> (a) To exercise the delegated rights and perform his or her delegated duties honestly and diligently and in the best manner to assure the best lawful interests of the company;
> (b) To be loyal to the interest of the company and the owner of the company; not to use information, know-how or business opportunities of the company; not to abuse his or her position and power nor to use assets of the company for the personal benefit of himself or herself or other organizations or individuals;
> (c) To notify the company in a timely, complete and accurate manner of the enterprises of which he or she and his or her related person is the owner of holds shares or controlling share of capital contribution.[10]

[9]"While under organic theory neither organ of the company has the authority to override or usurp the authority of the other – in reality, members in general meeting will, with their voting power, have control over the composition and, therefore, decisions of the board of directors. Further, directors owe duties to the company, but members do owe no corresponding duty to the company, and directors cannot expel members, but members can either expel, or not re-elect a director. Both of these considerations mean that control of the voting power at a general meeting will no doubt also mean control of the company despite the legal fact that only directors have control of the business of the company." Note 1 at 51.

[10]Note 3. Whereas the provisions for the Members' Council remain unchanged, as noted above, between the *Law on Enterprises 1999* and the *Law on Enterprises 2005*, the obligations for the Members' Council were amended. Thus Article 56 is the first attempt to give members duties to the company. The previous provision, Article 30 of *Law on Enterprises 1999* did not have these measures. It is most likely that Article 56 of *Law on Enterprises 2005* is an attempt to create directors' duties and has failed to understand that members cannot, and should not, have these obligations.

These are directors' duties and obligations, not those of a member. Bui's view is that this presents a potential conflict within the corporate governance framework due to the agency problem. A member is a principal, not an agent, and therefore does not owe the company duties of honesty, diligence and loyalty.[11] Indeed, in the US the duties of a director are owed both to the company and to the shareholders (this is not the case in Australia). The issue is clear, the members are the principals, so they do not owe the duties, they are instead the beneficiaries of the good performance by the directors of their duties.

Another perspective on this matter, however, is that rather than presenting an agency problem the provisions are intended to create a close company, similar to provisions that exist in South Africa.[12]

In contrast with Vietnam, the South African close corporation has strict adherence to a maximum of ten members.[13] Like the Vietnamese limited liability company with two or more members, South African close corporations do not issue shares.[14] Close corporations do outline extensive provisions for internal relations including fiduciary

[11]This is a universal concept and applies in the Chinese *Company Law 2005*. "Shareholders, directors and managers all share responsibilities in the company's operation. These responsibilities are stipulated in arts 38, 47 and 50 respectively. Ultimate authority in the company is with the shareholders who shall exercise their powers at meetings (arts 37-38) including the appointment and removal of directors who in turn appoint and can remove managers. The powers of shareholders' meetings are enumerated in art 38. They include setting the business and investment plans of the company, the election and removal of directors and the amendment of the articles of association…The board of directors is responsible to the shareholders and has a variety of traditional powers…" Blazey P and Chan KW (eds), *The Chinese Commercial Legal System* (Sydney, Lawbook Co, 2008) at 251. See also Kraakman R, Davies P, Hansmann H, Hertig G, Hopt K, Kanda H and Rock E, *The Anatomy of Corporate Law* (Oxford University Press, 2004).
[12]See Chilliers HS and Benade ML, et al (eds) *Corporate Law 3rd Edition* (Butterworths, 2000).
[13]Ibid at 596. Article 38 (1) (a) of the Law on Enterprises 2005 states that "the number of members shall not exceed fifty (5)." Note 3.
[14]Ibid at 600.

duties to the corporation as a separate legal entity, and not to each other as in the case of a partnership.[15]

Vietnam might consider revising Articles 47 and 56 of the *Law on Enterprises 2005* creating a board of directors for all limited liability companies as well as removing any obligation for members to owe duties to the company. Alternatively, they might wish to review the South African provisions for a close company and ascertain for themselves which provides the best corporate governance measures.[16]

Articles 50 and 51 of the *Law on Enterprises 2005* provides for the convening and procedures of meetings for the Members' Council of limited liability companies of two or more members. These provisions are essentially administrative, stating the procedural requirements for Members' Council meetings.

For Vietnamese shareholding companies Article 112 provides for meetings of the board of management.

> (2) Meetings of the Board of Management may be held on a regular [periodical] basis or extraordinary meetings may be held. The Board of Management may meet at the head office of the company or at some other location.
> (3) The Chairman may convene a periodical meeting of the Board of Management at any time he considers necessary, but there must be at least one meeting every quarter.

[15]Note 12 at 616.
[16]Neither the "law matters" thesis nor the OECD Principles on Corporate Governance outlines which corporate form provides the best governance. This could be an area of further research.

(4) The chairman of the Board of Management shall convene a meeting of the Board of Management when one of the following circumstances occur:

a. On the request of the Inspection Committee
b. On the request of the director or general director or on the request of at least five (5) other management personnel;
c. On the request of at least two members of the Board of Management;
d. In other circumstances stipulated in the charter of the company.[17]

In this context the reference to director or general director is not the equivalent of the term 'director' in Australian, UK or US corporate law. In Article 112 director refers to the equivalent of the chief executive officer (CEO), as outlined in Article 116 (2);

> The director or general director shall manage the day to day operation of the company; shall be supervised by the Board of Management and shall be responsible to the Board of Management and before the law…[18]

Furthermore it is not clear what is meant by "other management personnel" in Article 112 (4b)[19]. It could mean other members of the Board of Management, as opposed to

[17]Note 3. The remainder of Article 112 provides for the procedural requirements of notice, timing, attendance and voting.
[18]Ibid.
[19]Section 13 of Article 4 offers some guidance. It defines 'Manager of an enterprise' as "the owner or director of a private enterprise, an unlimited liability partner of a partnership, the chairman of a

senior management, which this term might reflect in the Australian context. However, the stipulation in Article 112 (4c) "on the request of at least two members of the Board of Management", leaves it a confusing clause that requires clarification.

It would be irregular for senior management in the Australian context to be given the capacity to request a meeting of the board of management. In Australia, the UK and the US directors can call directors' meetings, but not meetings of the board of management. It is theoretically possible that a provision could be written into the company's constitution giving senior management this power, but this would be unusual.

Section 248C (replaceable rule) of the Australian *Corporations Act 2001* states that any director may call a meeting of directors by giving reasonable notice individually to each of the other directors.[20] This is as it should be. Directors are individuals, not a collective or entity. They are individually liable for misdeeds and so must individually be able to call a board meeting to consider issues of the moment in the company's management. Strong chairs may endeavour to wrap the individual directors into a cocoon of teamwork and collegiality, but the reality of boardroom performance is different. Each individual director owes his or her duties and is individually liable.

Members' Council, the chairman of a company, a member of a Board of Management, a director or general director, and other managerial positions as stipulated in the charter of a company." Note 3.

[20]See Baxt R and Harris J, *Corporations Legislation 2008* (Sydney, Thomson Legal and Regulatory, 2008) at 234. See also *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 per Dawson J at 205 "Directors can act only collectively as a board and the function of an individual director is to participate in decisions of the board." There is the possibility under replaceable rule s248A for directors to pass a resolution without a directors' meeting under particular circumstances outlined in the section.

There is no requirement to hold a meeting of directors at a particular place, in either Australia or Vietnam. In Australia, all that is required is that each director is in attendance and in agreement that a meeting be held.[21] Each director must be made aware, with reasonable notice,[22] that the proceedings taking place between them are intended for the purposes of a directors' meeting.[23] Vietnam provides similar provisions in Article 112.

In Australia there is no requirement for minutes to be taken. The meeting can be adjourned provided that there is reasonable notice given to all directors as to when it will be reconvened.[24] In Vietnam, Article 113 of the *Law on Enterprises 2005* stipulates that all meetings of the Board of Management should be fully recorded in the minute book.[25] No provision exists for board meetings to be adjourned.

In Australia each director has a right to be present at directors' meetings.[26] A director improperly excluded from a meeting can seek an injunction.[27] The *Law on Enterprises 2005* is silent on this issue, but requires board members to fully participate (as opposed to asserting their right to participate) and provides that a board member can authorise another person to attend a meeting, if the majority of members of the board agree.[28]

[21]A director cannot be forced to participate in a meeting but must indicate any objection. A failure to object might result in the meeting being held to be valid. See *Barron v Potter* [1914] 1 Ch 895, *Aqua-Max Pty Ltd v MT Associates Pty Ltd* [2001] VSCA 104, *Commercial Bank Australia Ltd v Amadio* (1983) 151 CLR 447 and *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395.
[22]See *Electro Research v Stec* (1996) 20 ACSR 320 and *Petsch v Kennedy* [1971] 1 NSWLR 494.
[23]See *Harben v Phillips* (1883) 23 Ch 14, *Re Portuguese Consolidated Copper Mines Ltd* (1889) 42 Ch D 160, *Halifax Sugar Refining Co Ltd v Francklyn* (1890) 59 LJ Ch 591, *Young v Ladies' Imperial Club Ltd* [1920] 2 KB 523.
[24]See s248C (replaceable rule). Note 2.
[25]Note 3.
[26]See *Pulbrook v Richmond Consolidated Mining Co* (1878) 9 Ch D 610.
[27]See *Aqua-Max Pty Ltd v MT Associates Pty Ltd* [2001] VSCA 104.
[28]Article 112 (9). Note 3.

This leaves the Vietnamese board member vulnerable to being excluded from board meetings without remedy. Article 112 (8) does provide the right for members not attending meetings to vote by sending a written vote.[29] Although this might give some assistance to the excluded director, it is not equivalent to being able to seek an injunction.

Section 248F (replaceable rule) of the Australian *Corporations Act 2001* states

> Unless the directors determine otherwise, the quorum for a directors' meeting is 2 directors and the quorum must be present at all times during the meeting.

There is some confusion as to whether or not the directors can determine that a quorum of one is acceptable.[30] At common law a meeting is deemed to require at least two people. Notwithstanding that single director companies cannot meet the threshold of a two-person meeting, it does not follow that companies with more than two directors can use a single director company as a precedent for a quorum of one in their multi-director context.[31]

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[29]Article 112(8). Note 3. [does this need to be in quotes?]The vote must be enclosed in a sealed envelope and delivered to the chairman of the board at least an hour prior to the opening of the meeting. Written votes shall only be opened in the presence of all the people attending the meeting. Article 112 (8). Note 3. Even with this provision, a board member excluded from a meeting less than hour prior to the opening of the meeting would not be able to exercise this option.

[30]See *Sharp v Dawes* (1876) 2 QBD 26 and *East v Bennett* [1911] 1 Ch 163, *Re Fireproof Doors Ltd* [1916] 2 Ch 142, *Equity Nominees Ltd v Tucker* (1967) 116 CLR 518 and *Re Greymouth Point Elizabeth Railway and Coal Co Ltd* [1904] 1 Ch 32.

[31]"One person will not satisfy a quorum even where they are the delegate of two directors or they are a director themselves and a delegate of another director" see Cassidy J, *Concise Corporations Law 5th Edition* (The Federation Press, 2006) at 277.

The lack of a quorum can be resolved via a number of different mechanisms. The board could do any of the following:

1) Call a general meeting

2) Appoint a person as a director under replaceable rule s 201H

3) If quorum has failed due to the material interest of one of more of the directors under s 191 and s 195(1), then, under s 195(2) the board can decide that the director can cast a vote if it is satisfied that the interest is one that should not preclude the director from voting.

The *Law on Enterprises 2005* requires that meetings of the board of management are conducted where there are three quarters (3/4) or more of the total members attending.[32] It is silent on which mechanisms are available or required in the event of a lack of quorum. This could be problematic in circumstances of a dysfunctional board.[33]

In Australia, decisions are determined via majority vote of directors present and voting, with the chairman having a casting vote in some circumstances.[34] Directors

[32]Article 112(8). Note 3.

[33]This problem is partly addressed by Article 18 of Decree 139 as follows: "Where the stipulated number of members are not present at the meeting convened as stipulated in clause 1 of this article, the meeting shall be convened for a second time within fifteen (15) days of the date of the intended first meeting. In this case, a meeting shall be conducted when there are more than one-half of the total number of members of the board of management present". *Decree Providing Detailed Guidelines for Implementation of a Number of Articles of the Law on Enterprises* (No 139/2007/ND/CP) dated 5 September 2007.

[34]Under s 248G (replaceable) (1) "A resolution of the directors must be passed by a majority of the votes cast by directors entitled to vote on the resolution" and (2) "The chair has a casting vote if necessary in addition to any vote they have in their capacity as a director." Note: The chair may be precluded from voting, for example, by a conflict of interest. See Baxt R and Harris J, *Corporations Legislation 2008* (Sydney, Thomson Legal and Regulatory, 2008) at 234. Cassidy states, "The chairperson's right to an additional vote is, however, not recognised at common law and thus is dependent upon [the] replaceable rule or the right being specified in the constitution." Note 31 at 278.

have one vote each at board meetings. The Vietnamese provisions for decisions are the same as the Australian example and are set out in Article 112 (9).[35]

5.3 Meetings of members

In Vietnam the *Law on Enterprises 2005* sets out various articles that deal with shareholder meetings.[36] In Vietnamese shareholding companies the general meeting of shareholders includes all shareholders, who may vote, and is considered the highest decision-making authority within the company.[37]

There must be a general meeting of shareholders at least once a year.[38] At this meeting the shareholders have specific criteria on their agenda to consider.[39]

A quorum of shareholders representing at least 65% of the voting shares is required to constitute a valid general meeting of the shareholders.[40] Where this provision is not satisfied a second meeting may be convened within 30 days of the originally intended meeting. At the second meeting a quorum of shareholders representing at least 51%

[35]Note 3.
[36]Ibid. For shareholding companies see Articles 96-107.
[37]Ibid. See Article 96.
[38]"The General Meeting of Shareholders must hold a regular meeting within a time-limit of four months from the end of the financial year. At the request of the Board of Management, the business registration office may extend the time-limit, but not beyond six (6) months from the end of the financial year." Ibid. See Article 97(2).
[39]Article 97(2) states "The regular meeting of the General Meeting of Shareholders shall debate and pass the following issues; (a) Annual financial statements; (b) Report of the Board of Management assessing the actual status of the work of business management in the company; (c) Report of the Inspection Committee regarding company management by the Board of Management, the director or general director; (d) Amount of dividend payable by each class of share; (dd) other matters within its authority." Ibid. Further to this provision, Article 102(4) states "Only the General Meeting of Shareholders may make changes to the agenda accompanying the invitation to the meeting as stipulated in Article 100 of this law." Ibid.
[40]Ibid. Article 102(1). After Vietnam joined the WTO a new provision became applicable for companies with foreign owned capital invested in the services sector. In this situation, general meetings are able to pass a resolution by 51% vote. *Resolution 71/2006/QH11* dated 29 Nov 2006 of National Assembly of Vietnam.

of the voting shares will be sufficient for a valid meeting.[41] In the event that the second meeting fails due to a lack of the required quorum of shareholders, then a third meeting shall be convened. This meeting must be convened within 20 days from the date of the second intended meeting. In this instance there is no prerequisite quorum for a valid meeting.[42]

Under Article 104(1) of the *Law on Enterprises 2005* the general meeting of shareholders is able to pass resolutions that fall within its power. In this situation, resolutions can be passed by way of vote or by obtaining written opinion.[43] Under Article 104(5) resolutions passed by obtaining written opinions require approval from at least 75% of the total voting shares. The specific percentage must be stipulated in the charter of the company.[44] Where the company charter is silent on specific matters (as outlined in Article 104(2)) then the general meeting may pass resolutions by way of vote.[45]

A resolution requires specific criteria to be satisfied in order to be valid. These conditions are set out in Article 104(3) of the *Law on Enterprises 2005*.[46] This Article stipulates that at least 65% of the total voting shares of attending shareholders need to

[41]Ibid, Article 102 (2). This Article also states that the specific percentage of the voting shares required to be represented at the meeting shall be stipulated in the company charter.
[42]Ibid. Article 102 (3).
[43]Ibid. Article 104(1). For more on this and related topics see the *Vinaconex* case; www.vafi.org.vn/2006/search.php.
[44]Ibid. Article 104(5).
[45]Article 104(2) outlines the following matters as being open to resolution by the general meeting by vote provided the company charter is silent on them: (a) Amendment of or addition to the charter of the company; (b) Passing the orientation of development of the company; (c) Decision on classes of shares and the total number of shares of each class with the right to be offered for sale; (d) Appointment, discharge or removal of members of the Board of Management and Inspection Committee; (dd) Decisions on investments or the sale of assets valued at equal to or more than fifty (50) per cent of the total value of assets recorded in the latest financial statements of the company, if the charter of the company does not stipulate another percentage; (e) Passing the annual financial statements; (g) Reorganization or dissolution of the company. Ibid.
[46]Article 104(3). Ibid.

approve a resolution for it to be passed. The specific percentage is to be stipulated in the company charter.[47]

Resolutions passed by shareholders at a general meeting representing 100% of the total voting shares are immediately valid and effective.[48] This applies regardless of whether or not the meeting was properly or lawfully convened and the appropriate meeting procedures were implemented correctly.[49]

Resolutions passed by the general meeting of shareholders must be notified to shareholders eligible to attend the general meeting within 15 days from the date of approval.[50]

The board of management can convene an extraordinary meeting of the general meeting of shareholders as outlined in Article 97 of the *Law on Enterprises 2005*.[51] If the Board of Management fails to convene a general meeting as required by the law, then the Chairman of the Board will be liable and must compensate the company for any losses.[52] Any shareholder or group of shareholders that have more than 10% of the total number of ordinary shares, having held them for a consecutive period of six months or more, is able to:

1) request the convening of a General Meeting of shareholders where

[47]Article 104(3a) Ibid.
[48]Article 104(4) Ibid.
[49]Article 104(4) Ibid.
[50]Article 104(6) Ibid.
[51]Article 97(3) states that "The Board of Management must convene an extraordinary meeting of the General Meeting of Shareholders in the following cases: (a) The Board of Management considers it necessary to do so in the interests of the company; (b) The number of the remaining members of the Board of Management is less than the number of members required by law; (c) Upon demand by a shareholder or a group of shareholders as stipulated in Article 79(2) of this law; (d) Upon demand/request by the Inspection Committee; (dd) In other cases stipulated by law and the charter of the company." Ibid. Article 97.
[52]Ibid. Article 97.

a) the Board of Management makes a serious breach of rights of shareholders, obligations of managers or makes a decision which falls outside its delegated authority;
b) The term of the Board of Management has exceeded six months and no new Board of Management has been elected to replace it;
c) Other cases as stipulated in the charter of the company[53]; and

2) request the Inspection Committee to inspect each particular issue relating to the management and administration of the operation of the company where it is considered necessary.[54]

Under two specific conditions, shareholders, members of the Board of Management, the director (or general director) and the Inspection Committee have up to ninety days from the date of the minutes of the general meeting to request a Court or arbitrator to consider and cancel a decision of the general meeting of shareholders.[55]

In Australia, a director can convene a meeting, including the AGM, of the company's members under s 249C (replaceable rule). Under s 249CA a director can call a meeting of the company's members, despite anything to the contrary in the company's constitution.[56]

Extraordinary meetings are meetings with members, other than the AGM. The power for directors to call these meetings comes from s 249C and s 249CA. This power, like

[53]Ibid. Article 79(3).
[54]Ibid. Article 79 (2d).
[55]Article 107 states the two cases as: "(1) The procedures for convening the General Meeting of Shareholders did not comply with this Law and the charter of the company; (2) The order and procedures for issuing a decision and the content of the decision breach the law or the charter of the company." Ibid. See Article 107.
[56]See Note 2.

others of the director, must be used in good faith and in the best interests of the company.[57] A director must not convene a meeting that will preclude a particular member from attending.[58]

Directors do not have the capacity to postpone a meeting, unless otherwise specified in the company's constitution.[59] Furthermore, directors must abide by their fiduciary duty to ensure they provide sufficient and accurate information to members regarding the purpose and proposed resolutions of the meeting.

5.4 Conclusion

The governance of meetings is important and it reflects an attempt to provide either the directors or the members with a fair and equitable means of both exercising their powers within the organisation and combating the inherent agency problems that exist in limited liability companies.

Vietnam should review its meetings provisions to ensure they represent good governance. Part of this process might involve consideration of the following points:

- Changing the terms used to reflect more commonly held references, clearly separating out the various stakeholders in the company, i.e. directors, board of directors, members, general meeting of members, CEO and management.
- Clarifying the requirement of members to owe duties to the company.

[57]See *Permagon[Pergamon?] Press Ltd v Maxwell* [1970] 1 WLR 1167 and *NRMA v Snodgrass* (2001) 19 ACLC 769; 19 ACLC 1675.
[58]Members also have the power to convene a general meeting under s 249D and s 249F. Under s 249D the members request the directors to call the meeting having met specified criteria and under s 249F the members call the meeting and must pay the expenses. See Note 2. See also *Smith v Sadler* (1997) 15 ACLC 1683.
[59]Note 31 at 284.

- Providing robust mechanisms that protect both directors and members in situations of dysfunctional boards.

Chapter Six

The Duties of Directors: the Fiduciary Relationship

6.1 Introduction

Directors' duties fall into two broad categories, which together are designed to guide the decision making and activities of directors, as they conduct their affairs, in the company's best interest. It is important that directors observe their duties to ensure that they act in accordance with their obligations to the company and particularly its owners (shareholders). One category of duties relates to negligence and the common law duty of care, skill and diligence. The second category of duties for directors emanates from the directors' trusted relationship with the shareholders. This is a fiduciary relationship and results in the directors' fiduciary duties.

6.2 Fiduciary duty

Fiduciary duties in simple terms are derived from trust.[1] In the company-to-director relationship a good deal of trust is reposed, requiring commensurate honesty and fidelity from the agent, the director. *Black's Law Dictionary* defines fiduciary as:

> 1. A person who is required to act for the benefit of another person on all matters within the scope of their relationship, one who owes to another the duties of good faith, trust, confidence and candor < the corporate officer is a fiduciary to the corporation >.

[1] "… a fiduciary duty is one that arises in the context of trust. A fiduciary individual is someone who stands in a position of trust to another individual…. Originally a fiduciary duty was created only pursuant to a legal trust… However, the fiduciary concept has so dramatically expanded that it is now universally applicable: where one party has placed its 'trust and confidence' in another and the latter has accepted – expressly or by operation of the law – to act in a manner consistent with the reposing of such 'trust and confidence', a fiduciary relationship has been established." Ellis MV, *Corporate and Commercial Fiduciary Duties* (Carswell Thomson, 1995) at 1-1.

2. One who must exercise a high standard of care in managing other's money or property < the beneficiary sued the fiduciary for investing in speculative securities >.[2]

Although the concept of fiduciary obligation originated from trust it is no longer restricted to this realm.[3] Indeed, Finn claims it is meaningless to use the term fiduciary without being specific about the rules and principles that apply to that particular description.[4]

Fiduciary duties are specific to a relationship that creates a situation where one party has to trust another party to act on its behalf.[5] This relationship is created between a company and its directors. The directors control the company and therefore the company relies upon the directors for its wellbeing.

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[2]Garner BA(ed in chief), *Black's Law Dictionary* (St Paul, Thomson, 2004) at 658.

[3]"As LS Sealy has indicated in his short analysis of fiduciary relationships, it only achieved sustained currency in the law reports toward the middle of the last century and then only as a term descriptive of those relationships which were formerly designated as relationships of "trust" but which could no longer be so described with accuracy, given the technical meaning which came to be attached to the term "trust" itself. On the modern usage of "fiduciary", Sealy concluded that it is not definitive of a single class of relationships to which fixed rules and principles apply. Rather its use has generally been descriptive, providing a veil behind which individual rules and principles have been developed."[where did this quote start?] Finn PD, *Fiduciary Obligations* (The Law Book Company Ltd, 1977) at 1.

[4]"Once one looks to the rules and principles which actually have been evolved, it quickly becomes apparent that it is pointless to describe a person – or for that matter a power – as being fiduciary unless at the same time it is said for the purposes of which particular rules and principles that description is being used. These rules are everything. The description 'fiduciary', nothing. It has gone much the same way as did the general descriptive term 'trust' one hundred and fifty years ago." Ibid.

[5]"It has traditionally been accepted by Australian and English authorities that when the characteristics which give rise to a fiduciary relationship are present, that the feature which marks the fiduciary out for special scrutiny is the obligation of loyalty which is reflected in various facets, the most important of which is the duty to avoid a conflict of duty and interest and the duty not to misuse the fiduciary position without the fully informed consent of the beneficiary. These are simply facets or different aspects of the core duties of loyalty and fidelity, which entitles the beneficiary to the single-minded loyalty of the fiduciary. What lies at the heart of the fiduciary obligation is a standard of conduct and that standard is one which requires the fiduciary to act selflessly and with undivided loyalty in the interests of the other party. It is a very high standard, the effect of which is to limit the way in which the fiduciary may use a discretion or power over another party. The fiduciary must only have regard to the interests of the other party so that the self interest of the fiduciary has to give way to the interests of the beneficiary." Cope M, "A Comparative Evaluation of Developments in Equitable Relief for Breach of Fiduciary Duty and Breach of Trust" (2006) Vol 6 No 1 *QUTLJJ*, 118 at 118.

Ford also puts the director-company relationship in context:

> Fiduciary relationships may arise because, on the facts, a party has been appointed to act, or assumes to act, for the benefit of another whose appointment carries powers that could be exercised to the detriment of that other… Whatever the exact definition of the fiduciary concept, certain relationships are acknowledged to be fiduciary. They include: director and company; agent and principal; trustee and beneficiaries; promoter and company or other collective business enterprise; solicitor and client; stockbroker and client; partner and partner… A director can owe a fiduciary duty to a company for more than one reason.[6]

Looking specifically at the co-director category of fiduciary, Gower outlined four categories of fiduciary duties:

(1) that directors must act in good faith in what they believe to be the best interests of the company;
(2) that they must not exercise the powers conferred upon them for purposes different from those for which they were conferred;
(3) that they must not fetter their discretion as to how they shall act; and
(4) that, without the informed consent of the company, they must not place themselves in a position in which their personal interests or

[6]Ford HAJ, Austin RP and Ramsay IM, *Ford's Principles of Corporations Law* (Sydney, Butterworths, 2001) at 302.

duties to other persons are liable to conflict with their duties to the company.[7]

Directors have a duty to act in good faith and in the best interests of the company. This means that directors must not put their personal interests before that of the company, or use their position as director of the company to benefit themselves.[8]

Fiduciary duties are separate from a director's statutory duties. Although directors might comply with their fiduciary duties they could still be in breach of their statutory obligations. The duties of care and of loyalty are separate, of course. A director could be honest and negligent at the same time.[9]

Section 180 outlines the requirement for directors to act with care and diligence.[10] The standard applied by the Courts in ascertaining the required duty of care is largely an

[7]Davies PL and Prentice DD, *Gower's Principles of Modern Company Law 6th Edition* (Sweet and Maxwell Ltd, 1997) at 601.

[8]Finkelstein J states the background to the law in *ASIC v Vizard* when he states: "The provision of telephone services is not Telstra's only activity. It also invests in companies listed on the ASX. Large sums of money are involved. Telstra's board of directors decides whether an investment should be bought or sold. For an informed decision to be made, the board is given information that explains the nature of the proposed transaction and analyses its strengths and weaknesses. The information is highly confidential. The directors know that they must keep the information secret. They also know that they must not make any use of the information for their own purposes. These rules derive from the fact that a director is a fiduciary. The rules were first given statutory force by s 107 of the *Companies Act 1958* (Vic) which provided that a director must act honestly and not make use of any information acquired in that office to gain an improper advantage for himself or to cause detriment to the company. The provision was introduced following an investigation in Victoria into the affairs of Freighters Limited, whose directors had abused their position by (among other things) establishing companies that resold products formerly distributed by the company without notifying shareholders. Within four years s 107 (with some modification) was incorporated into the Companies Acts of all other States. At the time of the events with which this case is concerned, the relevant sections were, initially, s 232 and then s 183 of the *Corporations Law*." *ASIC v Vizard* [2005] FCA 1037 at paragraph 2.

[9]See Corkery JF, *Directors Powers and Duties* (Longman Cheshire Pty Limited, 1987)

[10]*Corporations Act 2001* (Cth) of Australia.

objective one.[11] Cassidy outlines that some aspects of subjectivity remain in an otherwise objective test.[12]

6.3 The best interests of the company

One area of contention concerns to whom the fiduciary duties of a director are owed. Does the director owe a fiduciary duty to shareholders, for example, as opposed to the company? This requires understanding the concept of legal personality as applied to the corporation.[13] In strict terms, the duty is owed to the company, being the separate legal entity incorporated at law. This is usually taken to mean the company as a 'whole', with due consideration being give to both existing and future shareholders.[14] *Percival v Wright* emphasised the principle that directors do not owe a duty to individual shareholders.[15] Although that authority is unpopular, its central tenet has

[11]"Section 180(1) sets out an objective test to measure the reasonableness of actions taken by directors or officers, requiring them to demonstrate the same degree of care and diligence that would be required of an ordinary reasonable person holding a similar position in the same circumstances. The strength of this objective standard is not diminished be the fact that the director is a non-executive, rather than an executive, director." Baxt R and Harris J, *Corporations Legislation 2008* (Thomson Legal and Regulatory, 2008) at 154.

[12]"…there are still aspects of subjectivity incorporated into this otherwise objective duty of care… The skills and experiences which the director purports to have to support his or her appointment to that office will also be relevant to the standard of care. In this way the flexibility of the law of negligence will allow the relevant standard of care to be tailored to the particular circumstances of each individual case." Cassidy J, *Concise Corporations Law 5th Edition* (The Federation Press, 2006) at 257.

[13]See *Salomon v Salomon and Co* (1897) AC 22. Corkery and Welling state: "The logical, *Salomon* view is best – the company is a separate entity from the shareholders and thus they are not responsible for each other's debts. Period… A separate corporate entity is unique to each corporation that is created." Corkery JF and Welling B, *Principles of Corporate Law* (Scribblers Publishing, 2008) at 44.

[14]"… fiduciary duties are owed to the company and to the company alone." Note 7 at 599.

[15]"It is urged that the directors hold a fiduciary position as trustees for the individual shareholders and that, where negotiations for sale of the undertaking are on foot, they are in the position of trustees for sale. The plaintiffs admitted that this fiduciary position did not stand in the way of any dealing between a director and a shareholder before the question of sale of the undertaking had arisen, but contended that as soon as that question arose the position was altered ... it was strenuously argued that, though incorporation affected the relations of the shareholders to the external world, the company thereby becoming a distinct entity, the position of the shareholders *inter se* was not affected, and was the same as that of partners or shareholders in an unincorporated company. I am unable to adopt that view. I am therefore of opinion that the purchasing directors were under no obligation to disclose to their vendor shareholders the negotiations which ultimately proved abortive. The contrary view would place directors in a most invidious position, as they could not buy or sell shares without disclosing negotiations, a premature disclosure of which might well be against the best interests of the company." *Percival v Wright* [1902] 2 Ch 421 at 456 -6.

been affirmed consistently – namely, that directors owe their duties only to the company and their best efforts must advance its interests only.

However, given Finn's explanation of fiduciary duties, specific circumstances could arise where a fiduciary relationship might exist between a director and a shareholder. *Brunninghausen v Glavanics* illustrates one example of this situation.[16] The nature of this relationship, however, would be different from simply being a shareholder of the company.[17]

6.4 Conclusion

Fiduciary duties are the wellspring of directors' duties. Shareholders rely on directors observing their fiduciary duties in good faith as part of governance measures in place to guard against the agency problem. Without fiduciary obligations in place, owners would be more concerned about their investments. Good governance requires that

[16]"…dismissing the appeal from the judgment of 15 February 1996: (1) The decision in *Percival v Wright* [1902] 2 Ch 421 that a director's fiduciary duties are owed only to the company and that no fiduciary duty is owed to shareholders to inform them of relevant negotiations is not binding on the Court. *Coleman v Myers* [1977] 2 NZLR 225; *Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666, 680; and *Glandon Pty Ltd v Strata Consolidated Pty Ltd* (1993) 11 ACSR 543 considered. (2) Whilst the general principle that a director's fiduciary duties are owed to the company and not to the shareholders is correct, the nature of the transaction may give rise to a fiduciary duty owed by the directors to the shareholders. *Galloway v Hallé Concerts Society* (1915) 2 Ch 233; *Ngurli Ltd v McCann [1953] HCA 39;* (1953) 90 CLR 425, 439-40, *Howard Smith Ltd v Ampol Ltd* [1974] AC 821, 835, 837-8; *Richard Brady Franks Ltd v Price [1937] HCA 42;* (1937) 58 CLR 112, 143; *Stein v Blake [1997] EWCA Civ 2474;* [1998] 1 All ER 724 CA, 727; *Gething v Kilner* [1972] 1 WLR 337, 341-2; *Bulfin v Bebarfalds*" *Brunninghausen v Glavanics* [1999] NSWCA 199 at 1. Handley J states: "The general principle that a director's fiduciary duties are owed to the company and not to shareholders is undoubtedly correct, and its validity is undiminished. The question is whether the principle applies in a case, such as the present, where the transaction did not concern the company, but only another shareholder." *Brunninghausen v Glavanics* [1999] NSWCA 199 at paragraph 57.

[17]Also as Worthington, who argues for a tightly defined notion of fiduciary obligation, states, … a breach of confidence is not a breach of fiduciary obligations, nor is a failure to act in good faith in the interests of the beneficiary and for proper purposes – although both are breaches of equitable obligations… fiduciary law operates only to exact loyalty; it does not concern itself with matters of contract, tort, unjust enrichment and other equitable obligations (such as breach of confidence)" Worthington S, "Fiduciaries: When is Self- Denial Obligatory?" (1999) Vol 58 No 3 *Cambridge Law Journal* 500-508 at 502-503.

fiduciary duties, as well as other directors' duties, are understood and acted upon by all company directors.

Chapter Seven

Duty to Act Honestly and in the Interests of the Company

7.1 Introduction

Directors' duties are designed to ensure that the inherent agency problems that exist between the owners (shareholders) and the managers (directors) of a company are addressed, in part at least. Having specific duties for directors to uphold helps ensure that the powers vested with the directors to manage the activities of the company are used in accordance with the company's best interests. Directors' duties fall into two categories. Firstly, there are duties imposed by equity law that are attributable to the fiduciary relationship between the director and the company. Secondly, there are common law duties to exercise care, diligence and skill. Often, the common law is supported by statutory provisions. The distinction that separates fiduciary duties from those derived from common law or statute is that fiduciary duties are based on considerations of trust, loyalty and fairness.

Articles 56, 72 and of the *Law on Enterprises 2005* outline the duties of members of the Members' Council, chairman and director or general director, for the three main forms of corporate entity in Vietnam.

For shareholding companies Article 119 states:

1. The Board of Management, the director or general director and other managers shall have the following obligations;

(a) To exercise their delegated powers and perform their delegated duties in accordance with this Law, relevant laws, the charter of the company, resolutions of the general meeting of shareholders;

(b) To exercise their delegated powers and perform their delegated duties honestly, diligently to their best in the interests of the company and of shareholders of the company;

(c) To be loyal to the interest of the company and shareholders; to not use or usurp information, know-how, business chances of the company, not to abuse their position and powers or to use assets of the company for the personal benefit of themselves or other organisations and persons;

(d) To fully and correctly give notice to the company of enterprises and related persons thereof who owners are or who own contributed capital, majority shares; this notice shall be displayed at the head office and branches of the company.

2. In addition to obligations stipulated in clause 1 of this article, the Board of Management and director or general director shall not increase salary and pay bonus where the company has not paid in full all the debts due and payable.
3. Other obligations in accordance with this Law and the charter of the company.[1]

[1]National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005*.

This Article captures the thrust of the other articles pertinent to the different corporate entities covered by the *Law on Enterprises 2005*. In short, they reflect a duty to be loyal to the company, to act in the best interests of the company, to act honestly and diligently. These are the fiduciary duties that, replicated one way or another throughout the world, bind directors to their companies (assuming at this point that the duty of care is in the nature of a fiduciary duty).

Further to the provisions set out in the *Law on Enterprises 2005*, Vietnam's *Model Charter* adds a further statement, Article 33.

> Thành viên Hội đồng quản trị, Giám đốc hoặc Tổng giám đốc điều hành và cán bộ quản lý được uỷ thác có trách nhiệm thực hiện các nhiệm vụ của mình, kể cả những nhiệm vụ với tư cách thành viên các tiểu ban của Hội đồng quản trị, một cách trung thực và theo phương thức mà họ tin là vì lợi ích cao nhất của Công ty và với một mức độ cẩn trọng mà một người thận trọng thường có khi đảm nhiệm vị trí tương đương và trong hoàn cảnh tương tự.

The best English translation of this is:

> Any member of the Board of Management, the managing director or chief executive officer and any authorised manager shall be responsible to perform his/her duties including duties in the capacity of a member of a sub-committee of the Board in a truthful manner, in the manner which is believed to be in the best interests of the

> Company, and with the degree of prudence which a prudent person must have in order to fill a corresponding position in similar circumstances.[2]

The term 'truthful' correlates to honesty or good faith. 'Prudence' correlates to care and diligence.[3] Of the former Farrar states: "The basic fiduciary duty is a duty to act bona fide for the good of the company… The requirement of good faith is a fundamental principle of equitable jurisdiction".[4] This is sometimes outlined as a director having to act honestly in the company's best interests.[5] The question then arises: what constitutes a director's honest belief of the company's best interest? How is this viewed by the Courts? Of the duty to act in best interests of the company, Pennycuick J stated that the test is:

> whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company.[6]

Therefore directors must act in accordance with a subjective test of their honesty and in the company's best interests as determined by an intelligent director in the director's position, a more objective test. The company's interest relates to the legal entity created at incorporation. The company, for all intents and purposes at law, is

[2]Ministry of Finance, Socialist Republic of Vietnam, *Decision Issuing the Model Charter Applicable to Companies Listing on the Stock Exchange/Securities Trading Centre 2007.*
[3]This is covered in Chapter Nine.
[4]Farrar J, *Corporate Governance: Theories, Principles and Practice* (2nd edition) (Oxford University Press, 2006) at 103 and 106.
[5]Cassidy J, *Concise Corporations Law 5th Edition* (The Federation Press, 2006) at 217.
[6]See *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] 1 Ch 62 per Pennycuick J at 74.

treated as a separate person.[7] Therefore the director must act in the best interests of this entity (person). Because the company usually includes shareholders, their interests, as a whole (including current and future shareholders), are considered as part of the director's contemplation when acting in the best interest of the company.[8] The Vietnamese duties will surely be interpreted and applied in line with very similar provisions in various common law country statutes.

7.2 Section 181

The fiduciary and common law duties are replicated in the Corporations statute. Further to the common law duty to act honestly in the best interests of the company,[9] section 181(1) of the Corporations Act 2001 states:

> A director or other officer of a corporation must exercise their powers and discharge their duties:
>
> (a) in good faith in the best interests of the corporation; and
>
> (b) for a proper purpose.[10]

Santow J in *ASIC v Adler* states:

> … I consider that the standard of behaviour required by s 181(1) is not complied with by subjective good faith or by a mere subjective

[7]"Incorporation begets a new person." Welling B, *Corporate Law in Canada 3rd Edition* (Scribblers Publishing, 2006) at 84.
[8]It should be noted that the shareholders are not the company, merely an element of the company. Moreover, major shareholders ought not carry more sway than other shareholders, in the contemplation of the director in consideration of their acting in the best interests of the company. For more see Chapter Three "Corporate Personality" in Welling B, Ibid, and Note 5 at 218.
[9]See *Byrne v Baker* [1967] VR 443 at 450, *Marcesi v Barnes* [1970] VR 434, *CAC v Papoulias* (1990) 8 ACLC 849.
[10]*Corporations Act 2001* (Cth) of Australia.

belief by a director that his purpose was proper, certainly no reasonable director could have reached that conclusion.[11]

7.3 Good faith

In the inquiry into a director's actions the Court considers the intention, motive and beliefs of the director and whether or not the actions were performed in the interests of the company, as their principal consideration.[12] Therefore, if directors use their powers to achieve benefit for themselves,[13] a third party, a shareholder or class of shareholders[14] or a stranger to the company,[15] or cause damage to the company itself, they would be in breach of their duties.

The duty of good faith comprises the duty to act honestly, the duty to exercise powers for proper purpose and the duty to act in the company's best interests. Honest belief that the action taken by the director is in the company's best interests is a requirement, but not sufficient condition for the validity of the action. The decision may still fail due to a breach of proper purpose or a failure to act in the best interests of the company.

[11] *ASIC v Adler* (2002) 20 ACLC 576 per Santow J at 705.
[12] See *Re Smith and Fawcett Ltd* [1942] Ch 304 per Lord Greene MR: "Accordingly, on the evidence I am satisfied, as the learned judge was satisfied, that there is no ground shown here for saying that the directors' refusal has been anything but a bona fide consideration of the interests of the company as the directors see them." at 309. See also *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Company NL* (1968) 121 CLR 483.
[13] See *Alexander v Automatic Telephone Co* [1900] 2 Ch 56, *Re National Provincial Marine Insurance Co; Gilberts Case* (1870) 5 Ch App 559.
[14] See *Spackman v Evans* (1868) LR 3 HL 171, *European Assurance Society, Manistry's Case* (1873) 17 Sol Jo 745, *Kerry v Maori Dream Gold Mines Ltd* (1898) 14 TLR 402.
[15] See *Anglo-French Co-operative Society, Re; Ex parte Pelly* (1882) 21 Ch D 492.

7.4 Proper purpose doctrine

As outlined in s 181, the duty to act in the company's best interests is not confined just to acting honestly, or in good faith, but also entails acting for the proper purposes for which the power was given. Directors have the power to issue shares, for example, and this power must be exercised for the proper purpose, the raising of capital. Proper purposes are for the best interests of the company as a whole.[16] If the director was acting for more than one purpose it is the substantial purpose that is scrutinised to determine whether or not the director was acting properly. If a director is acting properly, but in doing so also acts improperly as a consequence, then the incidental improper purpose is insufficient to affect a breach of duty.[17]

Directors can breach their duty to act with proper purposes if they are acting improperly in the company's best interest.[18] If the power is used for reasons other than self-interest the doctrine of proper purpose still applies.[19]

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[16]See *Australian Metropolitan Life Assurances Co Ltd v Ure* (1923) 33 CLR 199 per Isaacs J at 217 "A regulation such as art 21 entrusts to the directors a corporate power, which is exercisable by them as agents of the company. But although it is a power which necessarily involves some discretion, it must be exercised, as all powers must, bona fide – that is, *for the purpose for which it was conferred*, not arbitrarily or at the absolute will of the directors, but honestly in the interests of the shareholders as a whole…" See also *ASIC v Adler* (2002) 20 ACLC 576, *Mills v Mills* (1938) 60 CLR 150.

[17]*Pine Vale Investments Ltd v McDonnell and East Ltd* (1983) 1 ACLC 1294, *Woonda Nominees Pty Ltd v Chng* (2000) 18 ACLC 627.

[18]See *Hogg v Cramphorn Ltd* (1967) Ch 254 per Buckley J at 265: "It is common ground that the scheme of which this allotment formed part was formulated to meet the threat, as directors regarded it, of Mr Baxter's offer. The trust deed would not have come into existence, nor would the 5,707 shares have been issued as they were, but for Mr Baxter's bid and the threat that it constituted to the established management of the company. It is also common ground that the directors were not actuated by any unworthy motives of personal advantage, but act as they did in an honest belief that they were doing what for the good of the company. Their honour is not in the least impugned, but it is said that the means which they adopted to attain their end were such as they could not properly adopt." See also *Emlen Pty Ltd v St Barbara Mines Ltd* (1997) 24 ACSR 303, *Teck Corp Ltd v Millar* (1973) 33 DLR (3d) 288.

[19]See *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 per Lord Wilberforce at 831 and 833: "The judge found… that the Millers' directors were not motivated by any personal gain or advantage, or by any desire to retain their position on the board…The issue before him he considered to be whether the primary purpose of the majority of directors was to satisfy Millers' need for capital or whether their primary purpose was to destroy the majority holding of Ampol and Bulkships."

The duty of proper purpose allows the Court to invalidate directors' decisions that in the Court's opinion had a motivating purpose beyond that which is a legitimate use of the directors' power, or where it does not benefit the company.[20]

The Vietnamese provisions do not specifically refer to proper purpose, and the existing laws are yet to be tested extensively enough to ascertain how Courts will deal with arguments that might relate to proper purpose. Another possibility for Vietnam would be to elaborate on the existing provisions to include robust guidelines for acting in good faith and for proper purposes.

7.5 Nominee directors and alternate directors

Article 112 (9) of the *Law on Enterprises 2005* stipulates that:

> A member may authorise another person to attend a meeting if the majority of members of the Board of Management agree.[21]

This provision relates to meetings of the board of management. It is not clear whether the person authorised must also comply with Article 110 regarding the standards and conditions for acting as a member of the board of management.

[20]See *Ngurli Ltd v McCann (1953)* 90 CLR 425 per Williams ACJ, Fullagar and Kitto JJ at 438 "…the powers conferred on shareholders in general meeting and on directors by the articles of association of companies can be exceeded although there is a literal compliance with their terms. These powers must not be used for an ulterior purpose…powers conferred on directors by the articles of association of companies must be used bona fide for the benefit of the company as a whole." See also *Vatcher v Paull* [1915] AC 372, *Topham v Duke of Portland* (1869) 5 Ch App 40, *Allen v Gold Reefs of West Africa* [1900] 1 Ch 656, *Peters' American Delicacy Company Ltd v Heath* (1939) 61 CLR 457, *Mills v Mills* (1938) 60 CLR 150, *Whitehouse V Carlton Hotel Pty Ltd* (1987) 162 CLR 285.
[21]Note 1.

Presumably, the board of management would not agree with an authorisation of an unqualified representative.[22]

Article 79 (4 b) deals with nominee directors:

> …shareholders or a group of shareholders stipulated in clause 2 of this article shall have the right to nominate one or more persons as decided by the General Meeting of Shareholders as candidates to the Board of Management and the Inspection Committee.[23]

Nominee directors represent a class of shareholders, or some other person or group, within the company, which places them in a particularly difficult situation where the interests of those they represent and those of the company may at times be in conflict.[24] This in turn has a particular impact on fiduciary loyalty.[25]

[22]Part of Article 110 states that a member of the board of management must satisfy a number of conditions one of which is that the person must: "…own at least five per cent of the total number of ordinary shares or be another person with professional expertise and experience in business management …." Ibid.
[23]Ibid.
[24]See Companies and Securities Law Review Committee, *Nominee Directors and Alternate Directors* (Discussion Paper No 7, 1987).
[25]See *Levin v Clark* [1962] NSWR 686 per Jacobs J at 700 and 701 "It may be in the interests of the company that there be upon its board of directors one who will represent these other interests and who will be acting solely in the interests of such a third party and who may in that way be properly regarded as acting in the interests of the company as a whole. To argue that a director particularly appointed for the purpose of representing the interests of a third party, cannot lawfully act solely in the interests of that third party, is in my view to apply the broad principle, governing the fiduciary duty of directors, to a particular situation, where the breadth of the fiduciary duties has been narrowed, by agreement amongst the body of shareholders. The fiduciary duties of directors spring from the general principles, developed in Courts of equity, governing the duties of fiduciaries – agents, trustees, directors, liquidators and others – and it must be always borne in mind that in such situations the extent and degree of the fiduciary duty depends not only on the particular relationship, but also on the particular circumstances. Among the most important of these circumstances are the terms of the instrument governing the exercise of the fiduciary of his powers and duties and the wishes, expressed directly or indirectly, by direction, request, assent or waiver, of all those to whom the fiduciary duty is owed."

In the Australian context, notwithstanding agreed terms stating otherwise, the director's duty to act in the best interests of the company remains, regardless of whether or not it conflicts with the interests of the nominator. Lord Denning considered one instance of a conflict of interests between those of the nominator and those of the company to which the nominee was appointed:

> They probably thought that 'as nominees' of the co-operative society their first duty was to the co-operative society. In this they were wrong. By subordinating the interest of the company to those of the society, they conducted the affairs of the company in a manner oppressive to other shareholders and breached the duties they owed to the company.[26]

Although the Vietnamese legislation does not deal directly with the potential problems of nominee directors, some guidance may be found in Article 147 that outlines obligations for companies in corporate groups:

> (2) Contracts, transactions and other relations between the parent company and a subsidiary company shall be made and performed independently and equally in accordance with the terms applicable to independent legal subjects…

The implication is that duties are owed to each entity by the directors of that entity, unencumbered by loyalties or duties owed elsewhere.

[26] *Scottish Co-operative Society v Meyer* [1959] AC 324.

7.6 Directors of wholly- owned subsidiaries

Section 187 of the Australian *Corporations Act 2001* provides that:

> A director of a corporation that is a wholly-owned subsidiary of a body corporate is taken to act in good faith in the best interests of the subsidiary if:
>
> (a) the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company; and
>
> (b) the director acts in good faith in the best interests of the holding company; and
>
> (c) the subsidiary is not insolvent at the time the director acts and does not become insolvent because of the director's act.[27]

Cassidy summarises that "a nominee of a holding company may act in accordance with this company's interests whilst on the board of the subsidiary if the prerequisites detailed in s 187 are met."[28]

The Vietnamese provisions for corporate groups are not as robust and do not provide a detailed approach to the various problems that can arise with subsidiary companies and directors tied to potentially conflicting interests. Guidance for adjudicating on these matters would most likely come from Article 147 of the *Law on Enterprises 2005*:

[27]Note 10.
[28]Note 5 at 221.

(3) Where the parent company interferes beyond the authority of the owner, member or shareholder and compels a subsidiary company to conduct business operations in contravention of the normal business practices or conduct non-profitable activities without reasonable compensation in a relevant fiscal year which cause damage to the subsidiary company, the parent company shall be responsible for such damage

(4) The manager of the parent company which is responsible for the interference to compel the subsidiary company to conduct the business operations specified in clause 3 of this article and the parent company shall be jointly responsible for such damage

(6) Where the business operations referred to in clause 3 of this article and conducted by the subsidiary company derives any benefit to another subsidiary company of the same parent company, such subsidiary company as the beneficiary and the parent company shall be jointly responsible for returning such benefit to the former.[29]

Vietnam could consider elaborating these provisions to more clearly specify regulations that relate directly to directors' duties and obligations. Section 187 of the Australian *Corporations Act 2001* could provide some guidance.

7.7 Group companies

If a director holds directorships on several companies within one group potential conflicts of interest may arise regarding acting in accordance with the company's best

[29]Note 1.

interests.[30] Each company is its own legal entity (person), requiring the director to serve in each of their respective best interests (separately). If a director places the group's collective interest above that of any individual company, or one company's interest above that of another, then the director might be breaching duty to the disadvantaged company.[31] In circumstances where the respective interests of separate companies coincide, or s 187 applies, then the director is clear of any breach of duty.

Article 147 of the *Law on Enterprises 2005* reflects a similar understanding for the separate legal entities within a group of companies. It is not as clear, however, in specifying the directors' duties and obligations that accompany the particular conflict of interests that may occur in corporate groups. Relatively weak provisions for good faith compound this.

7.8 Duty not to fetter discretion

Directors must act honestly and in the best interests of the company. In order to do this effectively, directors must bring an independent judgment to their decision-

[30]The questions for fiduciary loyalty can be complex, as Hadden states: "Financial integration is likely to involve occasional or regular transactions by individual group companies which are not in the best interests of that company, such as loans or guarantees to other companies in the group or the sale or transfer of goods or property at less than the optimal price, in order to produce the most advantageous level of profit or loss in particular companies. Managerial integration is likely to involve the issuing of order to the directors of individual subsidiaries by group managers and the appointment of representatives of the group on the boards of those subsidiaries to ensure that all relevant information is passed on to group headquarters." Hadden T, "The regulation of Corporate Groups in Australia" (1992) Vol 15 No 1 *UNSWLJ* 61 at 64 and 65. See also *Walker v Wimborne* (1976) 137 CLR 1 per Barwick CJ, Mason J and Jacobs J (dissenting) at 7 "…there was a business association between the two companies and there was no evidence that the Asiatic directors did not intend to secure benefit of all the companies."

[31]See *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50 per Clarke and Cripps JJA at 147 "A particular difficulty arises when the directors of the particular company enter in the transaction on behalf of that company because they consider that transaction is of benefit to the group as a whole and do not give separate consideration to the benefit of their company." See also *Charterbridge Corp Lt v Lloyds Bank Ltd* [1970] Ch 62 per Pennycuick J at 74 and 75 "…The proper test, I think, in the absence of actual separate consideration, must be whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company." See also *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146.

making.[32] This is impossible if directors allows their decision making to be limited or influenced by the interests other than those that are in the best interests of the company.[33] Directors cannot agree to, or allow, their decision making to be fettered.[34] Accepting a bribe that is intended to influence boardroom decision taking is a breach of this duty. So, too, is any 'sale' of one's vote for any purpose other than the best interests of the company. Securing personal advancement by 'toadying' on the board may likewise be a breach of this important duty.

The *Law on Enterprises 2005*, as outlined already, has provisions for directors that require them to be loyal to the company and to act honestly.[35] The Vietnamese corporate law, in addressing instances of director's decisions being fettered, could rely on Article 108 (4):

> If the Board of Management passes a decision which is contrary to law or contrary to provisions of the charter of the company causing loss to the company, then the members who agreed to pass such decision shall be jointly liable as individuals for that decision and they

[32]See *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 per Lord Denning at 626 "It seems to me that no one, who has duties of a fiduciary nature to discharge, can be allowed to enter into an engagement by which he binds himself to disregard those duties or to act inconsistently with them. No stipulation is lawful by which he agrees to carry out his duties in accordance with the instructions of another rather than on his own conscientious judgment or in which he agrees to subordinate the interests of those whom he must protect to the interests of someone else. Suppose a Member of Parliament should be in the pay of some outside body, in return for which he binds himself to vote as he is directed to do. The agreement would clearly be void as against public policy."

[33]See *Thorby v Goldberg* (1964) 112 CLR 597 per Kitto J at 605 "The argument for illegality postulates that since the discretionary powers of directors are fiduciary, in the sense that every exercise of them is required to be in good faith for the benefit of the company as a whole, an agreement is contrary to the policy of the law and void if thereby the directors of the company purport to fetter their discretions in advance…" See also *Davidson v Smith* (1989) 15 ACLR 732 and *Fulham Football Club v Cabra Estates plc* [1992] BCC 863.

[34]"Any contract or resolution purporting to so fetter a director's discretion will be ineffective" Note 5 at 232.

[35]Note 1.

must compensate the company for loss; any member who opposed passing of the decision shall be exempt from liability.[36]

If directors allow their decision to be fettered, allowing themselves to be bribed or bullied into a decision being obvious examples, they are in turn robbing the company of a decision that is in the company's best interests. Such directors are therefore causing damage to the company because the company no longer enjoys the full benefit of their independent ability. In the Vietnamese context Article 108(4) could be useful in guiding decisions relating to fettered decision making by directors. It 'rewards' any directors who disassociate themselves from defaulting decisions by opposing them, stating that they will be exempt from liability.

7.9 Creditors

In the global realm, an emerging trend of discussion relates to whether or not directors owe a duty to creditors.[37] There are differing views as to whether this duty is

[36]Note 1.

[37]"… corporate law has evolved to impose many fiduciary duties on directors, which they owe to the company. The company therefore cannot be seen by the law to be an amorphous nexus of contracts but rather is a real entity to which legally enforceable duties are owed. What is in issue therefore is not the fact of directors taking into account other parties' interests – the issue is whether directors have a duty, or even a capacity, to take those interests into account when doing so would *conflict* with their duties to the company. The discussion by Courts on this issue therefore centres on the extent of their fiduciary duty, in the context of the traditional legal doctrines of separate legal entity and limited liability." Anderson H, "Directors' Personal Liability To Creditors: Theory Versus Tradition" (2003) Vol 8(2) *Deakin Law Review* 209 at 240. In many jurisdictions legislation makes it an offence for companies to intentionally defraud creditors. "The legislation of several Commonwealth countries and Ireland have provided for proceedings where fraudulent trading has been perpetrated… Unlike the UK and Ireland, Australia, which abandoned a provision that dealt with fraudulent trading in the early 1960s, does not now have two different actions for fraudulent trading on the one hand and irresponsible trading on the other. There is only one kind of activity that is proscribed, namely insolvent trading. Whether a director was engaged in what the UK legislation terms as fraudulent or wrongful trading, directors in Australia will be held liable for insolvent trading." Keay A, *Company Directors' Responsibilities to Creditors* (New York, Routledge-Cavendish, 2007) at 28.

owed directly to creditors as a separate consideration, or need only be considered in conjunction with deliberations on the best interests of the company.[38] To argue for a separate duty to creditors is problematic,[39] unless the company is insolvent.[40] The Vietnamese corporate law is weak in the area of insolvency compared to common law jurisdictions. Article 72 (2) of the *Law on Enterprises 2005* refers to the obligations of the director or general director not to pay themselves a pay rise or bonus when the company is unable to pay all of its due debts. However, this falls well short of the extensive provisions in common law jurisdictions, in particular, regarding insolvency. The law surrounding directors' duties in insolvency is a growing area, and trading provisions in the case of insolvency are worthy of consideration as an aid to sound governance.

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[38]See *Walker v Wimborne* (1976) 137 CLR 1 per Mason J at 7: "…it should be emphasised that the directors of a company in discharging their duty to the company must take account of the interest of its shareholders and its creditors. Any failure by the directors to take into account the interests of creditors will have adverse consequences for the company as well as for them." Cassidy states, "Under one view, while the company is solvent, a failure to consider creditors' interests will only amount to a breach of director's duty where it also involves a failure to act in the company's best interests. Where the company is insolvent or of doubtful solvency, however, creditors' interests displace those of the shareholders/company and the directors must have regard to creditors' interests." Cassidy J, *Concise Corporations Law 5th Edition* (Sydney, The Federation Press, 2006) at 222. See in *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 10 ACLR 395 per Street CJ at 733: "The company was plainly insolvent at the date of the lease and its collapse on that ground was imminent; thus no occasion arises to analyse the degree of financial instability which may be necessary to impose upon directors the obligation to consider the position of creditors. Secondly the prejudice to the creditors was the direct and calculated result f the lease; its purpose was to place the company's assets beyond the reach of the creditors; there is thus no occasion to examine on a value basis the commercial wisdom or unwisdom of the decision of the directors. The lease… was, however, entered into by the directors (albeit with unanimous approval of all of the shareholders) in breach of their duty to the company in that it directly prejudices the creditors of the company." See also *Nicholson Permacraft (NZ) Ltd (in liq) v* (1985) 3 ACLC 453, *Sunburst Properties Pty Ltd (in liq) v Agwater Pty Ltd* [2005] SASC 335.

[39]See *Spies v The Queen* (2000) 18 ACLC 727.

[40]See *Re New World Alliance Pty Ltd; Sycotex Pty Ltd v Baseler* (1994) 122 ALR 531 per Gummow J at 550 "It is clear that the duty to take into account the interests of creditors is merely a restriction on the right of shareholders to ratify breaches of the duty owed to the company. The restriction is similar to that found in cases involving fraud on the minority. Where a company is insolvent or nearing insolvency, the creditors are to be seen as having a direct interest in the company and that interest cannot be overridden by the shareholders. This restriction does not, in the absence of any conferral of such a right by statute, confer upon creditors any general law right against former directors of the company to recover losses suffered by those creditors… The result is that there is a duty of imperfect obligation owed to creditors, one which the creditors cannot enforce save to the extent that the company acts on its own motion or through a liquidator."

7.10 Equitable relief

In Vietnam the provisions for remedies need much improvement in general. For listed companies where the *Model Charter* applies there is a specific provision for directors who breach the duty to act honestly. Article 35 (1) stipulates that:

> Any member of the Board of Management, the managing director or chief executive officer or any manager who breaches the obligation to act honestly or who fails to fulfil his/her obligations carefully, diligently and professionally shall be liable for any loss incurred by such breach.[41]

This provision suggests that the individual member of the board or director will be personally liable for their breach. However, Article 35 (2) of the *Model Charter* refers to the company paying compensation to board members who are involved in a claim against them while they acted on behalf of the company.[42] This would imply that although directors would be personally liable under Article 35(1) for a breach of their duty to act honestly, they would be compensated by the company under Article 35(2). This creates a problem for corporate governance. It means that the director, who is obligated to act in the best interests of the company, can breach that duty to the company and then be compensated by the company for the damage incurred.

This is significantly different from the Australian position. Historically, it was possible, at common law, for a director to be exempt from liability under the company's constitution for liability for loss caused by negligent but honest acts or

[41]Ministry of Finance, Socialist Republic of Vietnam, *Decision Issuing the Model Charter Applicable to Companies Listing on the Stock Exchange/Securities Trading Centre 2007*.
[42]Ibid.

omission.[43] Importantly, the Vietnamese provision in Article 35(2) of the *Model Charter* does not specify that the losses incurred are restricted to negligent but honest acts or omissions. Moreover, the Australian position has since abandoned the prior exemption and now under s 199A(1) of the *Corporations Act 2001* companies can no longer exempt an officer, directly or indirectly, from liability to the company.[44]

In Australia, if directors are in breach of their duty to act honestly the remedy is equitable relief. This may include injunction, equitable damages or the actions in question being voidable at the company's discretion.[45]

The Vietnamese law needs to be revised to ensure that the protection of the company interest is upheld by the various pieces of legislation that regulate corporate behaviour. The Australian examples might suggest appropriate measures. Equity is essentially a common law concept and is not found in the Vietnamese civil law system. However, the point remains, that the Vietnamese can consider these types of concepts and practices in developing their own remedies.

7.11 Conclusion

[43]For more see Lipton P and Herzberg A, *Understanding Company Law 13th Edition* (Lawbook Co, 2006).
[44]Note 10.
[45]Section 1318(1) of the *Corporations Act 2001* states; "[Where Court may grant relief] If, in any civil proceeding against a person to whom this section applies for negligence, default, breach of trust or breach of duty in a capacity as such a person, it appears to the Court before which the proceedings are taken that the person is or may be liable in respect of the negligence, default or breach but that the person has acted honestly and that, having regard to all the circumstances of the case, including those connected with the person's appointment, the person ought fairly to be excused for the negligence, default or breach, the Court may relieve the person either wholly or partly from liability on such terms as the Court thinks fit." Note 10.

The duty to act honestly is obviously an important duty for directors. It lies at the heart of their fiduciary duties. It is critical for owners to be confident about this duty being observed if they are to have their concerns about agency problems alleviated.

The Vietnamese provisions for good faith are underdeveloped and need further refinement and testing. Articles such as the *Law on Enterprises 2005*, 108 (4) could be used to develop more comprehensive governance measures.

Vietnam also might clarify Article 35 (2) of the *Model Charter* – compensating for directors breaching their duties.

Chapter Eight

Conflicts of Interest

8.1 Introduction

Because directors enjoy considerable power within the company – they are the 'head' and 'brain' of the company – the law requires them to uphold high standards of honesty and integrity. Part of this requirement is to ensure their personal interests do not conflict with their duties to the company. Their fiduciary duties to the company prevent directors entering into contracts in which they have a personal interest and that involve an actual, or even a potential, conflict with the interests of the company.[1]

Furthermore, directors are not allowed to profit personally, either directly or indirectly, through being a director of the company, without the knowledge and agreement of the members. Bribes in any form are unacceptable. Directors cannot use company information or the company's assets to profit personally. Directors who are pursuing their personal profit or advantage are unlikely to be acting in the best interests of the company.

[1] *Chan v Zacharia* (1984) 154 CLR 178 per Deane J at 195 and 198 "Fiduciary relationships may take a wide variety of forms and may give rise to a wide variety of obligations. Ordinarily, in determining whether a constructive trust of particular property has arisen as a consequence of the existence or breach of a fiduciary obligation, it is necessary to identify the nature of the particular fiduciary relationship and to define any relevant obligations which flowed from it… The equitable principle governing the liability to account is concerned not so much with the mere existence of a conflict between personal interest and fiduciary duty as with the pursuit of personal interest by, for example, actually entering into a transaction or engagement 'in which he has, or can have, a personal interest conflicting… with the interests of those whom he is bound to protect' (per Lord Cranworth LC, *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461 at 471) or the actual receipt of personal benefit or gain in circumstances where such conflict exists or has existed." See also *Lees v Laforest* (1851) 14 Beav 250;51 ER 283, *Phipps v Boardroom* [1967] 2 AC 46, *North-West Transportation Co Ltd v Beatty* (1887) 12 App Cas 58, *Green & Clara Pty Ltd v Bestobell Industries Pty Ltd* [1982] WAR 1 and *Hospital Products Ltd v United Surgical Corp* (1984) 156 CLR 41.

8.2 Directors contracting with their own company

Article 120 of Vietnam's *Law on Enterprises 2005* stipulates the requirements for contracts with related parties to be approved by the shareholders. The threshold relatedness of the party is rather high at 35%. But contracts with related parties that violate the law will be invalid.

> 1. Contracts and transactions between the company and the following subjects shall be approved by the general meeting of shareholders or the Board of Management:
>
> (a) Shareholders, authorised representatives of shareholders holding more than thirty five (35) per cent of the voting shares of the company and the related persons thereof;
>
> (b) Members of the Board of Management; director or general director;
>
> (c) Companies stipulated in clause 1.a and clause 1.b of article 118 of this Law and the related persons of members of the Board of Management, director or general director.
>
> 2. Any contract and transaction valued at less than fifty (50) per cent of the total value of asset of recorded in the most recent accounting book of the company or a smaller percentage stipulated in the charter of the company shall be approved by the Board of Management. In this case the legal representative shall send to members of the Board of Management and display at the head office and branches of the company the draft of the contract or give notice on the main content of the transaction. The Board of Management shall make a decision on the approval of the contract or transaction within fifty (50) days from the date of the display; the related members shall not have the right to vote.

> 3. Other contracts and transactions except for circumstances stipulated in clause 2 of this article shall be approved by the General Meeting of shareholders. The Board of Management shall submit the draft contract or explain the main content of the transactions at the General Meeting of shareholders or ask for written opinions from shareholders. In this case, the related shareholders shall not have voting rights; contracts and transactions shall be approved where shareholders representing sixty five (65) percent of the total remaining votes so agree.
>
> 4. Any contracts, transactions which have been signed or performed without the approval stipulated in clause 2 and clause 3 of this article shall be invalid and dealt with in accordance with the law. The legal representative of the company, shareholders, members of the Board of Management or director or general director concerned must be liable for compensation for damages and must return to the company any benefits [they] gained from the performance of such contract of transaction.[2]

These provisions clearly set out the specific requirements in place for all contracts depending on their transaction value. Where clause 4 refers to breaches of the stipulated procedures invalidating the contract and being "'dealt with in accordance with the law"', more clarity is required about precisely what that means. Furthermore,

[2]See Article 120 National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005.* Clause 1a and clause 1.b of article 118 are as follows: "Members of the Board of Management, members of the inspection committee, the director or general director and other managers of the company shall declare their relevant interests with the company, including; (a) Name, address of the head office, field of operation, number and date of the issuance of the business registration certificate, place of business registration of the company owning contributed capital or shares; ratio and time the company owned those contributed capital or shares; (b) Name, address of the head office, field of business operation, number and date of the issuance of business registration certificate, place of business registration of enterprise where its related individuals jointly own or separately own shares or distributed capital of more than (35) per cent of charter capital." See Article 118 National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005.*

whereas clause 4 provides for compensation for damages and the return of benefits gained by the party or parties responsible there is seemingly no provision to ensure that this happens or other appropriate sanctions in place for the transgressor(s).

Article 34 (Responsibility to be honest and to avoid conflicts of interest) of Vietnam's *Model Charter* sets out a rule to prevent the usurpation of corporate opportunities:

> 1. Thành viên Hội đồng quản trị, Giám đốc hoặc Tổng giám đốc điều hành và cán bộ quản lý không đ ược phép sử dụng những cơ hội kinh doanh có thể mang lại lợi ích cho Công ty vì mục đích cá nhân; đồng thời không được sử dụng những thông tin có được nhờ chức vụ của mình để tư lợi cá nhân hay để phục vụ lợi ích của tổ chức hoặc cá nhân khác.
> 2. Thành viên Hội đồng quản trị, Giám đốc hoặc Tổng giám đốc điều hành và cán bộ quản lý có nghĩa vụ thông báo cho Hội đồng quản trị tất cả các lợi ích có thể gây xung đột với lợi ích của Công ty mà họ có thể được hưởng thông qua các pháp nhân kinh tế, các giao dịch hoặc cá nhân khác. Những đối tượng nêu trên chỉ được sử dụng những cơ hội đó khi các thành viên Hội đồng quản trị không có lợi ích liên quan đã quyết định không truy cứu vấn đề này.

The best English translation of this is:

> 1. Members of the Board of Management, the managing director or chief executive officer and managers shall not be permitted to use business opportunities profitable to the Company for personal purposes; and shall not be permitted to use information obtained by

virtue of their position for their personal benefit or the benefit of others.

2. Members of the Board of Management, the managing director or chief executive officer and managers shall be obliged to notify the Board of Management of any interests which may conflict with the interests of the Company and which they derive in their capacity as another economic legal entity or via some other personal transaction. The above-mentioned persons shall be permitted to use such opportunities where the members of the Board of Management who do not have related interests have decided not to investigate such issue.[3]

These measures set out provisions that are similar to those of the Australian *Corporations Act 2001* in s 191, although s 191 (3) is more specific about the contents of the notice required.[4] Moreover, s 191 (2) provides an extensive list of circumstances where a director does not need to provide notice.[5] The Australian provisions create more clarity for directors about their obligations to notify the Board of any material personal interest. From the "law matters" perspective more detail in this area provides better governance. Agency costs are less likely to occur and owners ought to feel more confident that directors are aware of their obligations. Also, measures are in place to ensure that directors comply with their obligations.

[3]Ministry of Finance, Socialist Republic of Vietnam, *Decision Issuing the Model Charter Applicable to Companies Listing on the Stock Exchange/Securities Trading Centre 2007.*
[4]Section 191 (3) states that "The notice required by subsection (1) must: (a) give details of: (i) the nature and extent of the interest; and (ii) the relation of the interest to the affairs of the company: and (b) be given at a directors' meeting as soon as practicable after the director becomes aware of their interest in the matter." *Corporations Act 2001* (Cth) of Australia.
[5]Ibid.

In Australia, breach of s 191 is a strict liability offence.[6] The Vietnamese provisions are not clear as to consequences for breach. Finally, the Australian corporate law outlines an extensive range of options for directors to consider in terms of resolving their conflict of interest. These are set out in s 195 and include being able to vote with ASIC approval, taking the issue to the general meeting, and obtaining approval of other directors.[7] The Vietnamese law only provides for the last.

The Vietnamese *Law on Enterprises 2005* does, however, include a detailed explanation of what 'related persons' means in Article 17. This definition encompasses an exhaustive list of both direct and indirect relationship influences that might impact on decision makers within the company.[8] This provision does not relate specifically to a material interest but does apply to a conflict of interest.

What constitutes a material personal interest? A director who holds a minor shareholding in another company that is contracting with the company of which s/he

[6]Ibid.

[7]Section 195 (3) allows for the director who holds a personal material interest in a matter to be present and vote at a meeting considering the matter with the approval of ASIC under a declaration or order made by ASIC pursuant to s 196 *Corporations Act 2001* (Cth) of Australia.

[8]Article 17 of the *Law on Enterprises 2005* states: "Related persons means organization or persons related directly or indirectly to an enterprise in the following cases: (a) A parent company, the manager of the parent company and the person who has the power to appoint such manager, and a subsidiary company; (b) A subsidiary company and a parent company; (c) A person or a group of persons being able to control the decision-making process and operations of such enterprise through the management bodies of the enterprise; (d) A manager of the enterprise: (dd) Husband, wife, father, adoptive father, mother, adoptive mother, children, adopted children, siblings of any manager of an enterprise, any member, or any shareholder holding a capital contribution or controlling share; (e) An individual who is authorised to act as the representative of the persons stipulated in paragraphs (a), (b), (c), (d), and (dd) of this clause; (g) An enterprise in which the persons as stipulated in paragraphs (a), (b), (c), (d), (dd), (e) and (h) of this clause holding shares to the level that they can control the decision-making process of the management bodies of such enterprise; (h) Any group of persons who agree to co-ordinate to take over the capital contribution, shares or interests in the company or control the decision-making process of the company." Note 2.

is a director would have a material interest. This would hold regardless of the size of the minor shareholding.[9]

Because directors owe a fiduciary duty to their company and because they have a statutory obligation to act honestly, they should not enter into contracts with their own companies, except when they have prior permission to do so, having disclosed their interests to the shareholders, who have granted them permission to proceed under the parameters outlined.

As Corkery and Welling state:

> Directors must give their company the full benefit of their experience and expertise. They cannot do that if they are *personally* interested in the same deals the company is interested in. The strict rule says that the mere possibility of conflict of duty and interest is enough. The fairness or unfairness of the contract is irrelevant.[10]

In Australia s 194 (replaceable rule) of the *Corporations Act 2001* stipulates the provisions required to allow a director to pursue a matter that involves a material personal interest.[11] If a director fails to observe s 194 or s 191[12] and proceeds to enter

[9]See *Todd v Robinson* (1884) 14 QBD 739. In this case a shareholder's "merely nominal" interest was sufficient to constitute an interest.
[10]Corkery JF and Welling B, *Principles of Corporate Law* (Scribblers Publishing, 2008) at 242 -3.
[11]Section 194 states: "If a director of a proprietary company has a material interest in a matter that relates to the affairs of the company and: (a) under section 191 the director discloses the nature and extent of the interest and its relation to the affairs of the company at a meeting of the directors; or (b) the interest is one that does not need to be disclosed under section 191; then: (c) the director may vote on matters that relate to the interest; and (d) any transactions that relate to the interest may proceed; and (e) the director may retain benefits under the transaction even though the director has the interest; and (f) the company cannot avoid the transaction merely because of the existence of the interest. If

into a contract that involves self-dealing, that contract is voidable at the discretion of the company. The company can ratify a voidable contract at its general meeting.[13] This is not the case if the breach is of the statute.[14]

The *Law on Enterprises 2005* requires the general meeting to approve specific transactions as outlined above. However, this is not equivalent to allowing the general meeting to ratify a voidable contract. The provision to allow the general meeting to ratify voidable contracts is necessary in some circumstances to ensure the best interests of the company are served.

Section 195 (1) of the Australian *Corporations Act 2001* prevents directors of public companies from being present while a matter that involves a material personal interest is being considered at the meeting or during voting on the matter.[15] However, s 195 (2) provides for a director holding a personal material interest in a matter to be present at a meeting that considers the matter and to vote, if the directors not holding a material interest have passed a resolution that satisfies the criteria set out in s 195 (2) (a) and (b).[16] One imagines this escape clause is too often used.

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disclosure is required under section 191, paragraphs (e) and (f) apply only if the disclosure is made before the transaction is entered into." Note 4.

[12]Section 191 (1) states: "A director of a company who has a material interest in a matter that relates to the affairs of the company must give the other directors notice of the interest unless subsection (2) says otherwise." Ibid.

[13] Note 10 at 242 and 243. Welling argues that the rights of the company are separate from the actions of the shareholders. He maintains that the shareholders should not be able to forgive a wrong done to the company. This is the sole domain of a judge. Welling states: "The corporate person is not to be identified with any majority of the shareholder, however overwhelming. Consequently, formal attempts by the shareholders to forgive alleged breaches of duty to the corporation cannot deprive the corporation of its right to action. Only a judge can do that, by exercising discretion against the complainant. A judge's opinion of the advisability of letting the action proceed is likely to be influenced by the majority view. However, a judge can't take refuge behind that majority view as English judges have done in the ratification cases." Welling, B *Corporate Law in Canada Third Edition* (Scribblers Publishing, 2006) at 523.

[14]See *Forge v ASIC* (2004) 52 ACSR 1.

[15]Note 4.

[16]Ibid.

Disclosure of a director's material personal interest in a matter, in accordance with s 191 (1), is required to be given at a directors' meeting and recorded in the minutes pursuant to s 191 (3).[17] Section 193 states that disclosure to the board is in addition to, and not in derogation of, any general law about conflict of interests, and any provision within the company's constitution restricting a director with respect to a conflict of interest.[18]

The Vietnamese regulations also provide further measures for listed companies relating to conflicts of interest in the *Decision Promulgating Regulations on Corporate Governance Applicable to Companies Listed on the Stock Exchange or a Securities Trading Centre* (No 12/2007/QD/BTC) dated 13 March 2007. Articles 23 to 25 relate specifically to preventing conflicts of interest and related party transactions.[19]

8.3 Contracts between directors and the company

In Australia, at common law, a director's interest (either direct or indirect) in a contract with the company must be disclosed to the general meeting. The disclosure must outline the specific nature of the director's interest, including the extent of the potential profit. Disclosure to the board and/or abstaining from voting is insufficient to comply with a director's fiduciary duty.

[17]Ibid. If s 191 (2) applies then notice is not required to be given by the director in accordance with s 191 (1). Ibid.
[18]*Corporations Act 2001* (Cth) of Australia. For a discussion on this area in the Singapore context see Koh P, "Disclosing Conflicts of Interest" (2005) 17 *Singapore Academy of Law Journal* 465.
[19]For more see *Decision Promulgating Regulations on Corporate Governance Applicable to Companies Listed on the Stock Exchange or a Securities Trading Centre* (No 12/2007/QD/BTC) dated 13 March 2007.

> The contract can only be validated by the general meeting after the director has made full and proper disclosure of his or her interest in the contract.[20]

Section 194 (replaceable rule) of the Australian *Corporations Act 2001* provides companies with the opportunity to allow directors to contract with the company if this is specified in the company's constitution.[21] This essentially precludes the application of the common law requirement to disclose the conflict of interest to the members. In this circumstance directors would remain bound by s 191 to disclose their interest to the board.[22]

8.4 Secret profits

Given that directors have a fiduciary duty to the company and owe the company the full benefit of their experience and expertise, they cannot use their position to profit personally. This applies to seeking to profit secretly. This situation often arises where directors come across privileged information that would not be accessible without

[20]Cassidy J, *Concise Corporations Law 5th Edition* (Sydney, The Federation Press, 2006) at 240.
[21]See *Transvaal Lands Co v New Belgium (Transvaal) Land and Development Co* [1914] 2 Ch 488 per Astbury J at 494, 497 and 498; "a director of a company is precluded from dealing, on behalf of the company, with himself and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect… this company has by art 98 contracted itself out of the common law principle, and that directors may contract on behalf of this company with themselves or with a firm in which they are partners, and that no such contract shall be avoided by reason of their fiduciary relation, provided that the director discloses the nature of his interest and does not vote in respect of any contract in which he is concerned."
[22]See *Gray v New Augarita Porcupine Mines Ltd* [1952] 3 DLR (2d) 1 per Lord Radcliffe at 13 "…a director is not entitled to place himself in a position in which his interest is in conflict with his duty. The company, it has been said, has a right to the services of its directors as an entire board. Even if the contract is not avoided, whether because the company elects to affirm it or because circumstances have rendered it incapable of rescission, the director remains accountable to the company for any profit that he may have realised by the deal. Subject to any statutory requirements that cannot be dispensed with, it is open to companies to make such provision as they please for the purpose of modifying the incidence of this general principle." See also *North Sydney Brick and Tile Co Ltd v Darvall* (1986) 5 NSWLR 681

them being a director of the company. A director might then take this information and use it to profit personally.

Article 72 in the Vietnamese *Law on Enterprises 2005* refers to obligations of members for one member limited liability companies. The Article states at 1 (c):

> Not to use information, know-how, business opportunities of the company, or abuse his or her position and power nor to use assets of the company for the personal benefit of himself or herself or other organisations of individuals.[23]

Similarly, the Australian *Corporations Act 2001* sets out provisions under s 182 and s 183 that stipulate that directors may not improperly use either their position (s 182) or information they are privy to (s 183) as a result of being, or having been, a director, to gain an advantage for themselves or someone else.[24]

8.5 Conclusion

The Vietnamese provisions form a basis for continued development. Currently they are not as detailed as their Australian or UK counterparts. In some cases this leaves the obligations of directors, in relation to conflicts of interest, open to broader interpretation and hence possible abuse. This, in turn, weakens the protections in place for shareholders, thereby reducing their confidence and creating uncertainty about their investments.

[23]Note 2.
[24]Note 4. Section 191 outlines the requirements of a director's duty to disclose a material personal interest and specifies under subsection (2) the circumstances when disclosure is not required.

The Vietnamese provisions are not considered strong in relation to director liability as indicated in research conducted by the World Bank. Vietnam scored 0 (the scale is from 0 to 10 with 10 being the highest) for director liability in comparison with an average of 4.6 for East Asia and Pacific economies.[25]

Vietnam could consider reviewing its provisions in this area with an eye to developing stronger measures for both directors' obligations and clearly defined sanctions for breach of these provisions.

Further thought might be given to providing consistency across company types to save confusion. Finally, consideration should be given to bolstering shareholders' protections through increased triggers for general meeting approval.

Davies, in discussing UK general meeting approvals in company law, states:

> There are, however, four further[26] cases where the requirement of shareholder approval is aimed at contributing directly to good corporate governance:

[25]For more see http://www.doingbusiness.org/ExploreEconomies/?economyid=202.

[26]"The main category of such cases is where a decision is likely to have an impact upon the shareholders' legal or contractual rights, even if the practical impact of that change on the member in a particular case is small (as with many changes to the articles) … the following can be said to constitute the main examples of this policy: alterations to the company's articles; alteration of the type of company, for example, from public to private or vice versa; decisions to issue shares or to disapply pre-emption rights on issuance; decisions to reduce share capital, re-purchase shares; redeem or re-purchase shares out of capital in the case of private companies or give financial assistance in the case of private companies; alterations to the class rights attached to shares; adoption of schemes arrangement[is there a word missing before arrangement?]; decisions to wind the company up voluntarily." Davies PL, *Gower's Principles of Modern Company Law 6th Edition* (Sweet and Maxwell, 1997) at 375-6.

> The requirement that the appointment of the company's auditors be approved by the shareholders;
>
> The requirement of shareholder approval for certain transactions entered into by directors and their associates with their company;
>
> The requirement of prior shareholder approval at common law for the taking by directors of corporate opportunities;
>
> The requirement for shareholder approval of defensive measures to be taken once a takeover offer is imminent – a requirement contained in the rules of the City Code on Takeovers and Mergers but those rules now have statutory force.[27]

All of these measures provide shareholders with greater certainty about the directors' decision making and in particular conflicts of interest between a director and the company.

[27]Davies PL, *Gower's Principles of Modern Company Law 6th Edition* (Sweet and Maxwell, 1997) at 376.

Chapter Nine

Directors' Duties of Care, Skill and Diligence

9.1 Introduction

In common law jurisdictions, directors' duties are often split into two broad categories that reflect the broad risks shareholders face with respect to the management of their company.[1] First are duties of loyalty that are derived from the fiduciary duties, and second are the duties pertaining to negligence that are usually described as common law duties of care, skill and diligence.[2] Fiduciary duties were discussed earlier: it is the second category that is explored here.

The historical approach, at common law, to the duty of care was to apply a subjective test that allowed a very low standard of care.[3] Romer J's famous judgment in *Re City Equitable* was careful to allow directors the benefit of any doubt about their competence. In other words: expect of them only what they can do, given their individual level of skill and experience. This approach reflected the view that directors were chosen by shareholders and thus their choices were the shareholders' business. It

[1] "The board may be active, but not in the direction of promoting the shareholders' interests; or the board may be slack and incompetent." Davies PL, *Gower's Principles of Modern Company Law* (8th ed, Sweet and Maxwell Ltd, 2008) at 488.

[2] Duty of care for directors can also be seen as having its origins in equity. "Both the duty and standard of care of directors were initially developed in equity, before the evolution of the modern tort of negligence." Farrar J, *Corporate Governance: Theories, Principles and Practice* (2nd edition, Oxford University Press, 2006) at 129.

[3] "The Courts invoked a subjective test, simply requiring the director to do the best he or she could: *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407." Cassidy J, *Concise Corporations Law* (5th ed, The Federation Press, 2006) at 254. Baxt outlines that *Re City Equitable Fire Insurance Co Ltd* is the traditional starting point for the duty of care where Romer J set out the common law duties expected of directors. "Romer J held that directors were expected to provide reasonable attention to the affairs of the company although they could delegate their duties to appropriate officers of the company; that is, to management. In addition, Romer J also held that it was not necessary for directors to attend every meeting, although that particular view has now been clearly as [sic] too lax because of cases that are more recent." Baxt R, *Duties and Responsibilities of Directors and Officers* (18th ed, Australian Institute of Company Directors, 2005) at 81. For more see Arsalidou D, "To be Active or Inactive: Is this a 'New' Question for Company Directors?" (2003) Vol 8 *Deakin Law Review* 318.

was also formulated with non-executive directors in mind rather than executive directors.[4]

In Vietnam, Article 119(1b) of the *Law on Enterprises 2005* states:

> The Board of Management, the director or general director and other managers shall … exercise their delegated powers and perform their delegated duties honestly, diligently to their best in the interests of the company and of shareholders of the company.[5]

This provision is for shareholding companies. Article 56(1b) and Article 72(1b) outline similar provisions for limited liability companies with two or more members and single member limited liability companies respectively. Interestingly, the wording in these Articles refers to the best (or in the case of 72(1b) "'maximum lawful"') interests of the company.[6]

This provision is poorly worded and falls short of the requirements set out in other jurisdictions. The wording in Article 119(1b) suggests that a subjective test is sufficient. Directors only need to perform "'diligently to their best in the interests of the company and of shareholders of the company"'. This also may present a conflict of interest in circumstances where shareholders' interests might not be in the best

[4]"The proposition was famously formulated by Romer J. in *Re City Equitable* that a "'director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience." Above n 1 at 489.
[5]National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005*.
[6]Ibid.

interests of the company.[7] For shareholding companies in Vietnam, the *Model Charter* in Article 33 stipulates that:

> Any member of the Board of Management, the managing director or chief executive officer and any authorized manager shall be responsible to perform his/her duties including duties in the capacity of a sub-committee of the Board… in the manner which is believed to be in the best interests of the Company, and with the degree of prudence which a prudent person must have in order to fill a corresponding position in similar circumstances.[8]

Here the provision cites the manner "'believed"' to be in the best interests of the company, which does not add any clarity in terms of understanding the test a Court might apply. However, the addition of the "'prudence which a prudent person… [in] a corresponding position in similar circumstances"', creates a more objective perspective to the diligence required by the director. As stated in Chapter Seven, 'prudence' equates to care and diligence. This is the most sophisticated wording of each of the provisions set down for shareholding companies, relating to care and diligence.

[7]The potential problem here is how this construction would be interpreted in the Vietnamese context. There is precedent in the US for a "'duty to shareholders"'. See Baird DG and Henderson MT, "Other people's money-fiduciary duty to shareholders" (2008) March Vol 60 Symposium Issue *Stanford Law Review*.

[8]*Decision Issuing the Model Charter Applicable to Companies Listing on the Stock Exchange/Securities Trading Centre* (No15/2007/QD/BTC) dated 19 March 2007.

Decision 12/2007/QD-BTC stipulates in Article 12 (1) that:

> Members of the board of management shall be responsible to implement their duties in an honest and diligent method in the best interests of the shareholders and the company.[9]

This does not add any strength to either the *Law on Enterprises 2005* or the *Model Charter*, and continues to refer to duties to both the shareholders and the company. A review of these different provisions, rewording and consolidating them as advisable, would facilitate a clearer understanding of the requirements of directors.

A further complication exists, in the short term, when the *Law on State Owned Enterprises 2003*, in Article 27, refers to obligations and responsibilities of the director, stating that the director is obliged:

> Thực hiện trung thực, có trách nhiệm các quyền và nhiệm vụ được giao vì lợi ích của công ty và của Nhà nước; tổ chức thực hiện pháp luật tại công ty.

The best English translation of this is:

> To perform the duties and powers assigned to him honestly and responsibly and for the benefit of the company *and the State*, to organise implementation of law at the company.[10]

[9] *Decision Promulgating Regulations on Corporate Governance Applicable to Companies Listed on the Stock Exchange or a Securities Trading Centre* (No 12/2007/QD/BTC) dated 13 March 2007.
[10] National Assembly, Socialist Republic of Vietnam, *Law on State Owned Enterprises 2003*. Emphasis added.

What the director's obligations are, when the 'benefit' of the company conflicts with that of the State, remains unclear. Moreover, what constitutes 'benefit'? Is 'benefit' the same as 'best interests' of the company? One possible approach to this provision could be to argue that the duty to the 'State' is similar to, or will bring out the same conundrums as, the emerging doctrine of corporate social responsibility. The 'State's' interest is equivalent to that of the other 'stakeholders' in the company, the employees, the suppliers and consumers and now, the environment. Party political objectives favouring Party officialdom, for example, could not automatically be viewed as 'State' objectives, the State being a notion of all the citizens as a corporate whole.

Although this consideration is not strictly within the parameters of the duty of care, because it is set out in the Vietnamese provisions in conjunction with their duty to be diligent it is included here. It may also be a useful consideration for the Vietnamese to pursue given their current provisions and the phasing out of the *Law on State Owned Enterprises 2003*. The meaning intended for the word 'State' in the provision is almost certainly that of the 'Party State'. This 'narrow view' might be cause to dismiss any further consideration of the provision because it is deemed inflexible and dictatorial and thus beyond adaptation for corporate social responsibility purposes. However, if we momentarily suspend the 'narrow view', or alternatively, accept that the broader purpose of the 'State' is the betterment of the people as a whole, then the corporate social responsibility discussion can be usefully pursued.

Australia does not have a statutory requirement or duty that requires directors to be socially responsible. However, the *UK Companies Act 2006* in s 172 codifies a duty to

promote the 'success' of the company.[11] The 'success' is to be measured by looking at a range of factors, including the long term consequences of decisions and the impact of the company's operations on the community and environment.

9.2 Corporate social responsibility

Corporate social responsibility (CSR) has been a development of the stakeholder theory that is particularly pertinent for multinational corporations. The argument for CSR suggests that corporate accountability and self-regulation by companies are dependent upon or geared towards socially responsible business behaviour.[12]

Sims states that one useful definition for CSR is:

> The continuing commitment by business to behaving ethically and contributing to economic development while improving the quality of life of the workforce and their families as well as of the community and society at large.[13]

Lantos argues that CSR has three components – ethical, altruistic and strategic – and whereas every organisation must practise ethical (avoiding social harms) practices,

[11]Section 172 outlines the duty to promote the success of the company and includes: "(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to – (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation of high standards of business conduct, and (f) the need to act fairly as between members of the company." *Companies Act 2006 (UK).* See also Chivers D, *The Companies Act 2006: Directors Duties Guidance* (The Corporate Responsibility Coalition, 2007).

[12]Sims RR, *Ethics and Corporate Social Responsibility: Why Giants Fall* (Praeger Publishers, 2003) at 43.

[13]Ibid.

for-profit publicly quoted businesses should not undertake altruistic CSR (good works at the expense of shareholders) unless these are strategically altruistic (good works which are also good for business).[14]

Carr argues differently, surmising that business works within an amoral framework whereas society operates within a more defined morality.[15] Under this argument it is the process of law to regulate the excesses of business rather than for business to be self-regulating from a morality perspective. Thus, according to this view one would posit that the role of the corporation is to be as efficient as possible in maximising profits while operating under the constraints and regulations imposed by law. Here, the role of external forces such as the law is to function as instruments to keep companies in line with the morality of society.[16] This is not the same as the corporation taking on its own self-imposed morality from the viewpoint of its corporate social responsibility.

Briggs argues that there is an inherent obligation to serve the wider community, and to fail to do this will bring about the destruction of capitalism.[17] It is not clear how Briggs has come to this conclusion. Nor is it clear what Briggs defines as service to the wider community. It is simplistic to view service to the wider community as achievable only via a specific community-minded program of social responsibility. One needs only to look as far as the nearest mining town to see precisely how one

[14]See Peters J, "'Social Responsibility is Free – How Good Capitalism can Co-exist with Corporate Social Responsibility"' in Crowther D, and Layman-Bacchus L (eds), *Perspectives on Corporate Social Responsibility* (Ashgate Publishing, 2004).
[15] See Carr AZ, "'Is Business Bluffing?"' *Harvard Business Review* (1968) January.
[16]"In most healthy market-driven societies, you have a host of institutions whose business it is to distinguish between trustworthy and the trustworthless … it only works if the firms that don't do a good job of separating wheat from chaff are punished". Surowiecki, J (ed), *Best Business Crime Writing of the Year* (New York, Anchor Books, 2002) at pxiii and xiv. It should be noted here that being law abiding does not necessarily mean that a company is acting morally.
[17]See Note 14.

company can provide for the well-being of an entire community that may well not even exist but for the operation of the mine.

Briggs's view is not well defined and fails to accept that a law-abiding corporation that is striving to be the most efficient and productive business it possibly can be is already contributing to society, regardless of CSR. Thus CSR is something more than simply contributing to the community.[18] Moreover, it is a specific choice taken by the company for its own reasons and does not of itself mean that the company will be of better service to the community. For example, if we take the mining town situation, and surmise the company embarks on a large-scale CSR program that cripples its efficiency and profit, thereby forcing retrenchments, which scenario is better for the community? A community buoyant with employment provided by a company that is profitable or a community that enjoys a CSR program but is suffering lack of morale due to increasing unemployment? This is a simplistic depiction for illustrative purposes.

One case that is often cited in support of CSR is the Ford Motor Company – Pinto case of the 1960s.[19] In this case, executives at Ford took a narrow decision against replacing the fuel tank which was known to carry a high risk of explosion in an accident. They calculated that the amount of compensation paid to dead or burned victims of crashes involving the Pinto caused by successful negligence suits against them would be less than the cost of recall and redesign.[20] The problem with this analysis is its assumption that the Ford executives did not take into account the potential loss of reputation for having a faulty fuel tank that could potentially kill or

[18]Ibid.
[19]Ibid.
[20]Ibid.

severely burn customers. Moreover, it fails to suggest that Ford should in fact have had no option but to recall and rectify the situation through the force of law. This then moves the debate out of the realms of CSR.

CSR remains problematic in corporate law theory and practice, because once a firm begins to go down that road it enters into a never-ending process of constantly weighing up the pros and cons of the relative economic benefits of a program against its costs. Regardless of how successful the CSR program is in terms of social or moral value, its value to the corporation will always be evaluated in terms of profit and loss, its 'profitability' or, more particularly, its impact on the stock price, if we are assessing CSR's impact on listed public companies. Business success must remain at the core of a company's values.

As Peters says, "'CSR will not sustain unless it has a capitalist imperative – unless it is shown to make good business sense"'.[21] In 1970 that most articulate of free market philosophers Milton Friedman maintained that:

> There is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.[22]

[21]Ibid at 214.
[22]Friedman M, "The Social Responsibility of Business Is to Increase its Profits" *New York Times Magazine*, 13 September 1970.

Frank supports Friedman and goes further by arguing that, "'According to the standard theory of competitive markets [firms maximising shareholder wealth] will attract more capital and eventually drive the [other] firms out of business"'.[23]

In this context the 'other' firms are those that are engaging in some form of CSR. It is critical to separate those actions that are specifically CSR related from actions that firms might undertake that 'appear' to be CSR based but are essentially aligned to their core objectives and are motivated by profit. According to Frank,

> When material incentives favour cooperation, it is more descriptive to call the cooperating parties prudent than socially responsible.[24]

As a counter to this approach, consider the argument that consumers and employees might favour companies that undertake CSR. In this scenario we need to assume that the CSR is genuine and not a mechanism to generate profit. Frank outlines here that Star Kist profits increased as a result of supplying 'dolphin-safe' tuna, despite the increased costs associated with delivering this product. Frank also cites increased profits for the Body Shop, Ben and Jerry's ice cream and McDonalds, all of which engage in CSR programs of some kind.[25]

The question then arises, would these companies undertake these programs if they were not making profits? In other words, when CSR programs are aligned to core objectives and have a positive impact on profits, shareholders will accept those programs, as their interests are still being met. What happens when this is not the

[23]Frank RH, *What Price the Moral High Ground* (Princeton University Press, 2004) at 58.
[24]Ibid at 59.
[25]Ibid at 66.

case? Is it unethical for directors exercising their fiduciary duty to serve the best interests of the company to continue with a CSR program despite shareholders losing profits? Or, are CSR programs the luxury of firms that can justify them only via increased profits for their shareholders? In this scenario, are CSR programs simply self-serving, even when they are legitimately beyond the core objectives of the firm?

As Corkery and Welling state:

> The pivotal issue is whether the company can be managed so that it recognises the interests of *stakeholders,* without jeopardising the primary function of creating profit. One view is that shareholders will get profits in the long term only if employees, customers, the environment and other "stakeholders" are satisfied…If one takes a long term view of profit maximisation, rarely is there incompatibility between the interests of shareholders in profit and the interests of wider stakeholders. Further, reduced reputation and loss of customers can flow from failure to respect societal concerns and prevailing ethical standards.[26]

More importantly, can we equate the CSR doctrine with a duty to the 'State' in the socialist context of Vietnam? As with the CSR explanation, it would be difficult for directors to pass off a decision made in the interests of the Vietnamese 'State' (certainly from the 'narrow view' of the 'State'), that was not in the best interests of

[26]Corkery JF and Welling B, *Principles of Corporate Law* (Scribblers Publishing, 2008) at 205-6. The issue in the Vietnamese context is one of defining the 'State' in terms of a 'stakeholder', or in broad terms 'the people' and exploring the extent to which there is connection with the CSR discussion. This requires a separate enquiry from the purpose of this thesis.

the company, as being bona fide made in good faith or in accordance with the diligence of their duty of care. The problems that the 'narrow view' of the 'State' can create are exhibited in the *Tuong An Vegetable Oil* case.

9.3 *Tuong An Vegetable Oil case*

This case highlights the conflicts of interest that can exist when directors act in accordance with the State's interest rather than for the company's best interest. Directors in Tuong An Vegetable Oil secretly directed purchases away from imported materials of oil (originally supplied by Wilma), instead purchasing from Vocarimex, a major (State owned) shareholder of Tuong An Vegetable Oil. The directors who carried this decision were appointed by Vocarimex.[27] The case was never taken to Court because of the nature of the parties involved and the cumbersome processes of the Vietnamese legal system.

Letters of appeal were sent to various government organisations by the lawyers representing the minor shareholders, including a request to the State Capital Investment Corporation to change the directors representing Vocarimex in Tuong An Vegetable Oil. This request was unsuccessful. Even had the request been granted the same problem would remain. Having a duty to the State compromises and confuses the directors' duty of care and their primary responsibility to the best interests of the company.

Le summarises it well:

[27]This case also highlights other areas on the law, especially regarding subsidiary companies, which are discussed in other chapters.

> The problem is that Vocarimex, as an authorised representative of the State, has used the State's capital in order to seek its own profit, going against the State's policy on equitization… conflict between the State's profit and that of the authorized representative of the State… is one of the reasons why public investment has never gained its effect and why many equitized enterprises are not honest and effective in their business.[28]

9.4 Subjective test

In Australia the original subjective test for the duty of care has been replaced with a more objective standard, both at common law and statute. In *Daniels v Anderson* the auditors of the company were held liable because they negligently failed to report on the company's improper bookkeeping and its inadequate internal controls on foreign exchange dealings.[29] The Court reiterated and considered four major aspects of the duty of care: the nature of the duty, the ability for directors to delegate, the need for directors to keep informed about the company's business, and the standard of care for both executive and non-executive directors.[30]

In the *AWA case (Daniels v Anderson)*, Clarke and Sheller JJA recognised that directors can and should have diverse backgrounds. But they do not just represent their background:

[28]Le N, *Tuong An Vegetable Oil: The key is the conflict between the State's profit and that of the authorised representative of the State* (unpublished paper, 2008). See Appendix D.
[29]For more see Note 26 at 294.
[30]Ibid.

> There is no doubt reason for establishing a board which enjoys the varied wisdom of persons drawn from different commercial backgrounds … a director, whatever his or her background, has a duty greater than that of simply representing a particular field of experience.[31]

There was some contention that non-executive directors ought to be able to rely on a lower standard and one that is more subjective in nature.[32] This argument was rejected.[33]

What is there in this common law development that assists Vietnamese corporate regulation? First, Vietnam might ensure that its duty of care and diligence is objectively applied and assessed. Second, that duty applies with equal force to all directors, whether State or private appointees, executive or non-executive in nature. The Vietnamese can strengthen their corporate governance by reviewing the provisions for the directors' duty of care and outlining a more objective test, especially for limited liability companies. Article 33 of the *Model Charter* takes a step in this direction for shareholding companies.

Common law jurisdictions, in particular, detail a far deeper exploration of the requirements of directors regarding the duty of care than is outlined by the Vietnamese provisions. The Vietnamese versions refer only to diligence and do not mention care

[31] *AWA case (Daniels v Anderson)* (1995) 37 NSWLR 438 at 500.
[32] See Rogers CJ in *AWA case (Daniels v Anderson)* (1995) 37 NSWLR 438. "The debate on whether the duties imposed by the statute was too onerous, developed after the famous AWA case (1991 and on appeal 1995)… this led to the introduction of the so-called statutory business judgment rule" Baxt B, *Duties and Responsibilities of Directors and Officers* (18th Edition Institute of Company Directors, 2005) at 81.
[33] "An objective standard of care was held to be applicable to both executive and non-executive directors." Cassidy J, *Concise Corporations Law* (5th Edition, The Federation Press, 2006) at 255.

or skill. Thus some steps have been taken in strengthening the standard of care required by directors in shareholding companies, but these do not relate to directors in other forms of company, and still fall well short of the considerations set down in the common law jurisdictions.

9.5 *ASIC v Adler*

ASIC v Adler revealed a crowded and multi-coloured array of breaches of duty. Santow J states:

> So far as Adler is concerned, the findings indicate not only that he contravened the *Corporations Law* in many respects but also that he did so with knowledge of the impropriety of his conduct and for the purpose of advancing his own personal interests at the expense of the companies of which he was a director or officer. His conduct thus amounted to a most serious dishonesty, occurring not as an isolated act but as a pattern of conduct over a number of months. This conduct was coupled with persistent lies and deceits designed to conceal his conduct and/or its impropriety.[34]

This case included other breaches of duty, not least of which was the duty to act honestly. Most importantly, however, the Court found that there was a conflict or potential conflict between the director's interests and the director's duties and that the duty of care requires a standard that demonstrates some diligence.[35] Santow J outlined

[34]*ASIC v Adler* [2002] NSWSC 483 at para 57.
[35]*ASIC v Adler* [2002] NSWSC 483 at para 56(vii) Santow J cites *ASC v Donovan:* "In assessing the fitness of an individual to manage a company, it is necessary that they have an understanding of the

a number of considerations which form the cornerstone of the law on the directors' duty of care, in any jurisdiction.[36] Santow J's formulation illustrates the depth to

proper role of the company director and the duty of due diligence that is owed to the company." *ASC v Donovan* at 607."

[36]Due to the importance of these considerations, they are included here for the purposes of referencing them in contrast to the brevity of the Vietnamese provisions. Santow J: "I commence by setting out as a series of summary propositions, the principles applicable to the duty of care and diligence, now as enacted in s 180 of the *Corporations Act* and as they relate to delegation. (1) Directors owe a duty of care and skill at common law and in equity. (2) However, the equitable duty to exercise reasonable care and skill is not properly classified as a fiduciary duty. (3) The statutory duty of care and diligence, s 180, is framed in similar terms to its predecessor s 232. (4). It has been said of the latter that the duties imposed upon directors by it are essentially the same as the duties of directors under the common law. (4) In determining whether a director has exercised reasonable care and diligence one must ask what an ordinary person, with the knowledge and experience of the Defendant might be expected to have done in the circumstances if he or she was acting on their own behalf. (5) However, under the implied term in a contract of employment of an executive director, the director (such as here Mr Williams and Mr Fodera) will be taken to have promised the company that he or she has the skills of a reasonably competent person in his or her category of appointment and that he or she will act with reasonable care, diligence and skill. (6) Although the standard of reasonable care is generally said to be that of an ordinary prudent person (*Re City Equitable Fire Insurance Co. Ltd* [1925] Ch 407 per Romer J) there is some suggestion that directors of a professional trustee company owe a higher duty of care. (7) In determining whether a director has breached the statutory standard of care and diligence (s180(1)), the Court will have regard to the company's circumstances and the director's position and responsibilities within the company: see also Explanatory Memorandum to the CLERP Bill 1999 (para 6.75). (8) In accordance with these responsibilities directors are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company: *Daniels t/as Deloitte* (supra) at 664. That is to say, (supra) at 666-67: (a) a director should become familiar with the fundamentals of the business in which the corporation is engaged; (b) a director is under a continuing obligation to keep informed about the activities of the corporation; (c) directorial management requires a general monitoring of corporate affairs and policies, by way of regular attendance at board meetings; and (d) a director should maintain familiarity with the financial status of the corporation by a regular review of financial statements. Indeed, he or she will be unable to avoid liability for insolvent trading by claiming that they had never learned to read financial statements. (9) A director appointed to a company because of special expertise in an area of the company's business is not relieved of the duty to pay attention to the company's affairs which might reasonably be expected to attract inquiry, even outside that area of expertise. (10) At general law, a director is entitled to rely without verification on the judgment, information and advice of management and other officers appropriately so entrusted. However, reliance would be unreasonable where directors know, or by the exercise of ordinary care should have known, any facts that would deny reliance on others. (11) Although reasonableness of the reliance or delegation must be determined in each case, the following may be important in determining reasonableness: (a) the function that has been delegated is such that '"it may properly be left to such officers'": *Re City Equitable Fire Insurance Co Ltd* (supra) per Romer J . (b) the extent to which the director is put on inquiry, or given the facts of a case, should have been put on inquiry: *Re Property Force Consultants Pty Ltd* (supra) per Derrington J at 1,060. (c) the relationship between the director and delegate, must be such that the director honestly holds the belief that the delegate is trustworthy, competent and someone on who reliance can be placed. Knowledge that the delegate is dishonest or incompetent will make reliance unreasonable. (d) the risk involved in the transaction and the nature of the transaction: *Permanent Building Society v Wheeler* (1994) 14 ACSR 109 (although in this case the Chief Executive Officer in question also had a conflict of interest). (e) the extent of steps taken by the director, for example, inquiries made or other circumstances engendering '"trust'"; (f) whether the position of the director is executive or non-executive: *Permanent Building Society v Wheeler* per Ipp J, though, in *Daniels v Anderson* (supra), the majority have moved away from this distinction. (12) That general law explains what the *Corporations Act* now requires when referring (s190(2)) to '"reasonable grounds'" in codifying the directors' responsibilities for the actions of the delegate. Thus under s198D of the *Corporations Act* directors may delegate any of their powers to a committee of directors, a single director, an employee

which the Australian law goes regarding the director's duty of care, and offers key requirements for the duty of care from which Vietnam might take guidance:

(1) A duty of care, skill and diligence;

(2) A standard of care that is commensurate with the skill and diligence of a director in that company at that time;

(3) The standard of care is that of the ordinary prudent person, at the very least;

(4) The standard of care requires the director to appropriately inform him/herself of all aspects of the company's affairs as one would reasonably expect of a director in that company at that time;

(5) Any delegation of duties should reflect all the qualities of care, skill and diligence of a director in that company at that time;

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of the company or any other person (This delegation must be recorded in the company's minute book: see s251A). Moreover, the director will be responsible for the delegate's exercise of power if he or she did not believe on reasonable grounds and in good faith, after making proper inquiries if the circumstances indicate the need for it, that the delegate was reliable and competent in relation to the power delegated and would exercise the power in conformity with the duties imposed on the directors of the company by the *Corporations Act*: s190(2). (13) For the purposes of s180(1) and relevantly in the present case, failing to ensure that a company makes loans only in accordance with its authorised practices and failing to ensure that the company has a proper system of controls and audit in its business to avoid any defalcation by officers and employees may amount to breaches of the statutory duty of care and diligence. (14) Where there is a transaction involving the potential for conflict between interest and duty, as here arose, the duty of care and diligence falls to be exercised in a context requiring special vigilance, calling for scrupulous concern on the part of those officers who become aware of that transaction to ensure that any necessary corporate approvals are obtained and safeguards put in place. While the primary responsibility will fall on the director or officer proposing to enter into the transaction, this does not excuse other directors or officers who become aware of the transaction. (15) In order for the safe-harbour '"statutory business judgment rule'" to be relied upon, the director must first have made a business judgment. Then that business judgment must satisfy the following requirements, namely made in good faith for a proper purpose; after the director has informed himself as to the subject matter of the judgment to the extent he reasonably believes to be appropriate; in circumstances where the director does not have a material personal interest in the subject matter of the judgment and rationally believes that the judgment is in the best interests of the corporation:s180(2). The director's belief that his or her judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in that position would hold: s180(2)." *Asic v Adler and 4 Ors* [2002] NSWSC 171 (14 March 2002).

(6) The director's care, skill and diligence reflects a rational belief of a reasonable person in that company at that time that their decisions were in the best short and long term interests of the company.

In short, the duty is both subjective (specific and contextual) and objective, rational, and exhaustive,[37] and carries a minimum standard of care of the ordinary prudent person. A higher standard applies if the specific circumstances merit it. In borderline cases, where the appropriate standard is not clear, the onus ought to be on the director to show why a higher standard should not be applied, rather than being able to rely on the minimum standard of the ordinary prudent person.

9.6 Diligence

Diligence is an alternative formulation of the duty of care. It is a synonym for care. Diligence also appears in the Vietnamese provisions. The sole reference in Vietnam to acting diligently to the best of one's ability as a director contrasts with the extensive provisions outlining what constitutes care and diligence in the Australian statute. The Vietnamese version does not explain what constitutes diligence for directors. It may be susceptible to subjective considerations, as indeed the Australian provision has been over the years. It is unclear how it would be interpreted by the Courts. Are there situations within the company context that influence the standard of diligence required? Is the diligence of a small company director the same as the diligence required of a director of multinational company? How would the Vietnamese Courts adjudicate on diligence?

[37]This means that each decision of the director needs to follow the same set of criteria in determining that the duty has been observed. For example, if directors claim they delegated their powers or for some reason were 'unaware' of the facts, questions follow: What measures did they take to ensure their duty of care was observed, in each of their decisions? What care, skill and diligence did they exhibit in their delegation? How does their decision to delegate their powers reflect their duty of care?

In Australia, section 180(1) of the *Corporations Act 2001* states:

> A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
>
> (a) were a director or officer of a corporation in the corporation's circumstances: and
>
> (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.[38]

This provision outlines an objective test for the standard of care that is determined by considering the corporation's circumstances, the office held and the responsibilities the office carries within the corporation.[39] Vietnam could look at the Australian statute and case law to formulate a stronger law on the duty of care.

9.7 Business judgment rule

[38] *Corporations Act 2001* (Cth) of Australia. Note that this provision is not restricted to directors but also applies to "officers" of the corporation.

[39] "The director may not plead personal idiosyncrasies in defence of a claim that he or she has breached the duty of due care and diligence." Note 33 at 259.

The Courts in Australia generally form the view that it is for directors to determine what is in the best interests of the company, and not the Courts.[40] As a result Courts are reluctant to review the business decisions of directors, particularly when they are made in good faith and for a proper purpose.[41] This approach to the business judgment rule comes with the caveat that the decision will be subjected to scrutiny by the Courts if no reasonable board would have made it.[42]

The common law applies to directors' decisions and s 180(2) stipulates a statutory version of the business judgment rule that applies to the duty of care, skill and diligence.[43]

The Vietnamese law lacks an appreciation of the complexities involved in a comprehensive understanding of directors' diligence. The business judgment rule assists in allowing the entrepreneurial essence of the company to thrive without overly intrusive laws, while at the same time providing for essential corporate governance to protect the company from negligent or incompetent directors. Roe argues that the

[40] *Smith v Fawcett* [1942] Ch 304 at 306 per Lord Greene MR; *Carlen v Drury* (1812) 1 V&B 154, 35 ER 61 per Lord Eldon; *Howard Smith Ltd v Ampol Petroleum* [1974] AC 821 at 832; [1974] 1 NSWLR 68

[41] See *Howard Smith Ltd v Ampol Petroleum* [1974] AC 821 at 832; [1974] 1 NSWLR 68, *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483 at 493 per Barwick CJ, McTiernan and Kitto JJ: "Directors in whom are vested the right and duty of deciding where the company's interests lie and how they are to be served may be concerned with a wide range of practical considerations, and their judgment, if exercised in good faith and not for irrelevant purposes, is not open to review in the Courts."

[42] See *Hutton v West Cork Railway* Co (1883) 23 ChD 654 at 671, *Shuttleworth v Cox Bros (Maidenhead Ltd)* [1927] 2 KB 9, *Charterbridge Corp Ltd v Lloyds Bank Lt*d [1970] Ch 62.

[43] Section 180(2) refers to the business judgment rule and states: "A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they: (a) make the judgment in good faith for a proper purpose; and (b) do not have a material personal interest in the subject matter of the judgment; and (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and (d) rationally believe that the judgment is in the best interests of the corporation. The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold." *Corporations Act 2001* (Cth). Section 180(3) defines business judgment as: "… any decision to take or not take action in respect of a matter relevant to the business operations of the corporation." *Corporations Act 2001* (Cth).

business judgment rule allows managers to make mistakes without consequences.[44] A balance has to be struck between protecting entrepreneurial endeavour and ensuring proper observance by directors of their duties to the company.

The Vietnamese provisions are light on shareholder protections and remedies in general. The various provisions outlined above for Vietnamese corporate entities tend to conflate duties of care, skill and diligence with those of acting honestly and in the best interests of the company. In other jurisdictions these are separate and distinct duties. A director can act honestly and negligently at the same time.

In China the *Company Law 2005* provides for duties of loyalty and diligence to the company.[45] Despite these provisions China, like Vietnam, has been criticised for having a weak accountability and governance system for company directors.[46] Although it is accepted that the legal systems have evolved separately and in distinctly different cultural and political contexts from the Anglo-American governance systems, there remains a considerable gap between the written provisions in China and Vietnam and tangible enforcement or any form of serious implementation of them.[47] If the explanation for this gap is the cultural, political and economic context of China and Vietnam, why stipulate the provisions? One could argue that the provisions are a step

[44]"The American business judgment rule has judges *refusing* to review and regulate managers' unconflicted acts. Managerial mistakes, disloyalty to shareholders (as long as the managers' hands are not in the cookie jar), over-investment, under-investment, and so on, are just not subject to corporate law review." Roe MJ, *Political Determinants of Corporate Governance* (Oxford, Oxford University Press, 2003) at 19.

[45]See Article 146 of People's Republic of China *Company Law 2005*.

[46]"Current Chinese company law contains insufficient provisions on directors' duties and no effective accountability system" Shi C, "International Corporate Governance Developments: The Path for China" (2007) Vol 7 *Asian Law* 60-94 at 76.

[47]"A major problem with adopting foreign legal ideas in the process of legal reform in China is that 'quite often the Chinese legislators simply borrow the concepts and rules found in foreign laws without really understanding the meaning of the rules in these foreign laws'". McNaughton A, "Directors' Duties Under China's Company Law: Something Borrowed, Something New" (1999) Vol 6 Nos 1& 2 *Canberra Law Review* 167 at 167.

along the road to improved governance (from the Anglo-American perspective), as easily as one could suggest that it is merely window dressing to lure foreign investment, while maintaining scant regard for 'good' governance.

McNaughton's argument in the Chinese context is that the provisions have been borrowed and implemented to help China evolve step by step.

> The terminology is similar to that of the Anglo-American provisions on which they are modelled… however the legal theories and interpretations underlying these rules are not well developed at all. This holds true for the rest of China's economic laws generally and the laws relating to directors' duties in particular. Many of the concepts therefore which underlie China's new economic laws are necessarily still 'external' to China's legal system and to those who are interpreting and applying them. In other words, conduct is prescribed or proscribed by statute, as a result of which duties and obligations will be observed; but there is not yet a recognition of the duty or obligation itself, which comes with the internalisation of a principle or concept.[48]

This, however, assumes that the 'internalisation' process will occur and result in an understanding of the concepts that is similar to that of the Anglo-American context. Hawes adds to this discussion by stating that:

[48]Ibid at 189.

> …far from creating a company law system that is converging with Western models, whether Anglo-American or Continental – in other words, one in which most companies are autonomous entities free from government interference – the recently amended PRC Company Law actually reinforces the Chinese Government's latest policy drive to regain control over the private and foreign-funded sectors of the Chinese economy. It doubtless reflects the government's concern that, with the rapid expansion of these sectors, it may soon be faced with a rich and powerful new capitalist class that could challenge its political supremacy.[49]

The counter to Hawes' proposition is that foreign investors and the international community, including the WTO, will expect China and Vietnam to live up to the provisions set down, as understood in the Anglo-American context. China and Vietnam will be given time to evolve their understanding but they will need to provide evidence of their efforts to genuinely implement the provisions.

The United Kingdom has similar provisions for duties of care, skill and diligence to those of Australia. *The Companies Act 2006 (UK)* provides s 174 for what was previously a subjective test for a director's duty of care and skill. Unlike the Australian law there is no provision in Vietnam or in the UK for a business judgment shield for directors. The mechanism provided to Australian directors through the business judgment rule, that when applied, exonerates them from a breach of their

[49]Hawes C, "Interpreting the PRC Company Law Through The Lens of Chinese Political and Corporate Culture" (2007) Vol 30 No 30 *UNSW Law Journal* 813 at 823.

duty of care and diligence, is taken up by the Courts in the UK. They consider the particular circumstances and attributes of the individual directors before them.

> …like the Australian Courts, the Courts now appreciate that in large modern corporations, there is a distinction between oversight and management…This means that the nature and extent of the duty of skill, care and diligence will depend on such factors as the size, location and complexity of a company's business and the urgency of any decision…The formulation in s 174 takes account of the special background, qualifications and management responsibilities of a particular director.[50]

Some commentators claim that the provisions set down for German directors relating to duties of care and diligence and fiduciary duties are more comprehensive in some common law countries than in Germany.[51] This observation sits well with the evidence provided by the "law matters" debate. It is here that Vietnam needs to move from 'borrowing' to 'evolving' its own good governance framework. The "law matters" evidence is comprehensive.[52] It demonstrates a strong correlation between economic growth and good governance. Of course, one needs to be wary of challenging the

[50]The Right Honourable Lady Justice M Arden DBE, "The Companies Act 2006 (UK): A New Approach to Directors' Duties" (2007) Vol 8 *The Judicial Review* 145 at 157.
[51]See Baums T, "Corporate Governance: National Report on Germany" (Paper presented at the XV International Congress of Comparative Law (*Academie Internationale de Droit Compare*), Bristol, 1998). See also *German Corporate Governance Code* Gesetz.
[52]See La Porta R, Lopez-De-Silanes F, Shleifer A and Vishny RW, "Legal Determinants of External Finance" (1997) Vol LII, No 3, July *The Journal of Finance* 1131-50. See also Walker G and Fox M, "Corporate Governance Reform in East Asia" (2002) Vol 2 No 1 *Corporate Governance* 4-9, and The World Bank Group, "Which Countries Give Investors the Best Protection" (1997) April Note No 19 *Privatesector*.

Vietnamese, given their history, but the fact remains that Vietnam either accepts the "law matters" evidence or demonstrates why it is an exception to it.

Even in more sophisticated and elaborate corporate law frameworks, like Australia, there are spectacular corporate failures that centre on directors' incompetence and criminality. One needs only to review the corporate collapse of HIH to see the extent of this problem. So, if mature and comprehensive corporate law frameworks fail to prevent corporate collapse, one can only wonder what the true extent of, and potential for, corporate failure might exist in the less mature corporate law environment of Vietnam.

9.8 Conclusion

Vietnam does not have a comprehensive duty of care, skill and diligence. There is mention of a duty to be diligent but it is not well defined or supported. Vietnam should consider evolving its own corporate laws that are derived from good governance. It is impossible to have a strong corporate governance framework without comprehensive directors' duties. If we accept the "law matters" evidence then the Vietnamese need to bolster their directors' duties. The duty of care, skill and diligence is one of the cornerstone duties for directors. Vietnam needs to develop its approach to duty to reflect an appropriate balance between protection for shareholders on the one hand and entrepreneurial endeavour on the other.

Vietnam could 'evolve' its current duty to the 'State' and combine it with some of the other provisions outlined in Decree 139, to formulate its framework for corporate

social responsibility. The existing provisions in Decree 139 include the prohibited lines of business in Article 4 such as:

> (c) Business in List 1 Chemicals (stipulated in international treaties);
>
> (e) Business in all types of games and toys which are dangerous or harmful to the personal development and health of children or the security, order and safety of society; and
>
> (n) business in all types of scrap causing environmental pollution.[53]

Vietnam has a long tradition of decision making by 'elders' within the village community who make decisions in the best interests of the village. This decision-making framework is an ideal resource for Vietnam to explore in order to further develop its ideas about corporate social responsibility. The history and traditions encapsulated by Vietnamese village decision making, coupled with the legal provisions outlined above, could be developed into a ground-breaking 'Vietnamese model' of corporate social responsibility that could be a benchmark for the world.[54]

[53] *Decree Providing Detailed Guidelines for Implementation of a Number of Articles of the Law on Enterprises* (No 139/2007/ND/CP) dated 5 September 2007.
[54] This idea warrants further exploration that is beyond the focus of this thesis.

Chapter Ten

The Directors' Financial Relationship with the Company

10.1 Introduction

Directors' duties reflect the broad risks shareholders face with respect to the management of their company. There are duties of loyalty, derived from fiduciary obligations, duties pertaining to negligence, that are common law, and statutory duties of care, skill and diligence. These duties are relevant in considering how directors conduct their financial relationship with the company. For example, the fiduciary duties that exist between the directors and the shareholders define a relationship of trust. Therefore, it is antithetical to have directors who are trusted by the shareholders conducting affairs that will benefit themselves, at the expense of the best interests of the company. This is often referred to as self-dealing. Directors cannot be acting in the capacity of director, in the best interests of the company and at the same time be using their position for self-dealing at the expense of the company. An exception to this would be if a director has been given prior permission by the shareholders, having disclosed the parameters of the transaction to them, before conducting any business.

10.2 Directors' remuneration

In the Vietnamese *Law on Enterprises 2005* Article 117 outlines the remuneration for the Board of Management, the director or the general director. It states:

1. The company is entitled to pay remuneration, salary to members of the Board of Management, director or general director and other managers based on the business result and efficiency.

2. Where the charter of the company does not stipulate, the remuneration, salary and other benefit of members of the Board of Management, the director or general director shall be paid according to the following regulations:

(a) Members of the Board of Management shall be entitled to remuneration and bonus. Remuneration for work shall be calculated on the basis of the working days, which are necessary to fulfil the obligation of the member of the Board of Management and the remuneration per day. The Board of Management shall estimate/calculate the remuneration for each member on the principle of unanimity. The total amount of remuneration for the Board of Management shall be decided by the general Board of Management at the annual meeting;

(b) Members of the Board of Management shall be entitled to the payment for the expenses on bill, accommodation, travel and other proper expenses they have spent in order to fulfil delegated obligations;

(c) The director or general director shall be entitled for salary and bonus. The salary of the director or general director shall be decided by the Board of Management.

3. The remuneration of members of the Board of Management and the salary of the director or general director and other managers shall be calculated in the business operation expenses of the company in accordance with laws on the corporate income tax and shall be presented in a separate item of the annual financial statements of the company and shall be reported to the general meeting of shareholders at the annual meeting.[1]

These provisions allow for the board members to determine their own pay, and this is not in accordance with good corporate governance, except for circumstances where the charter, presumably agreed upon by the members, stipulates the remuneration for the board. Members need to be able to vote on the directors' remuneration to ensure appropriate scrutiny is given to this area of the company's management.

The French, for example, require the general meeting to allocate the directors' remuneration, which is then distributed among the directors as determined by the board.[2]

[1]National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005*. Article 58 sets out the provisions for remuneration, salary and bonus of members of the Members Council, director or general director for Limited Liability Companies with Two or More Members. It states: "1. The company has the right to pay remuneration, salary and bonus to members of the Members' Council, director or general director and other managers in accordance with its business outcome and effectiveness. 2. Remuneration and salary of members of the Members' Council, director or general director and other managers shall be included in business costs in accordance with provisions of the laws on corporate income tax and other relevant laws, and must be recorded in a separate item in annual financial statements of the company." Article 73 includes the provision for inspectors but is otherwise worded similarly and with the same intentions as Article 58 for Remuneration, salary and other benefits of managers of the company and inspectors of One Member Limited Liability Companies. National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005*.
[2]See Article L. 225-45 *The French Commercial Code 2005*.

The Vietnamese requirement for the board of management to report members' remuneration to the general meeting of shareholders is insufficient in providing appropriate checks and balances of the board's decision making in this area. This is not the same as the general meeting having to vote on the report to approve the remuneration.

Public disclosure of relevant interests for shareholding companies is outlined in Article 118 of the *Law on Enterprises 2005.* This provision, however, does not go to the same lengths as those provided under the *Corporations Act 2001.* For example, there is no specific requirement under Article 118 for the directors to declare their remuneration or other interests in a directors' report.[3]

Further disclosure is provided for under Article 124, which provides for the Inspection Committee to demand documents in relation to the management, administration and business operation of the company.[4] Also Article 129 stipulates that shareholding companies must submit their annual financial statements (approved by the general meeting of shareholders) to the authorised State body, and a summary of annual financial statements must be sent to all shareholders.[5]

Article 119 (2) states that:

> The Board of Management and director or general director shall not increase salary and pay bonus where the company has not paid in full all debts due and payable.[6]

[3]See Article 118. Note 1.
[4]See Article 124. Ibid.
[5]See Article 129. Ibid.
[6]See Article 119. Ibid.

Providing a mechanism for the members to vote on the directors' remuneration would provide better governance for Vietnamese companies. An independent consultant's report to the members on fair and equitable remuneration for directors in similar companies might be of additional benefit for members when deciding on appropriate remuneration.

Alternatively, the current option in Article 117(2), that the company has options for remuneration of directors when the charter does not stipulate the requirements, could be amended to ensure that all directors are paid in accordance with the charter.[7]

In China the *Company Law 2005* provides the opportunity for shareholders to take action against directors for illegal use of corporate assets.[8] Although this provision exists and arguably could be used in relation to excessive or unreasonable executive compensation, it remains difficult for it to be used in relation to executive remuneration in general.[9] Directors' remuneration in China is determined by the shareholders meeting in accordance with Article 37 (2).[10]

[7]The debate about directors' pay and their performance is also an important consideration for shareholders. Evidence exists that agency problems are reduced and performance increased with stronger corporate governance measures that allow increased scrutiny for shareholders. "The involvement of large shareholders in monitoring or controlling activities could mitigate the agency problems…The large shareholders' high incentives to monitor management are expected due to their wealth being tied into the company's financial performance. Evidence by Bethel et al. (1998) is consistent with this prediction where theyfind that the performance of a company improves following an acquisition of a block of shares by an active investor." Abdullah SN, "Directors' remuneration, firm's performance and corporate governance in Malaysia among distressed companies" (2006) Vol 6 No 2 *Corporate Governance* 162-174 at 166.
[8]See Article 152 at People's Republic of China *Company Law 2005.*
[9]Ibid.
[10]Ibid.

In common law jurisdictions there is no inherent entitlement for directors to be paid.[11] The company's constitution, however, usually provides for their payment. In the absence of this specific provision non-executive directors are not entitled to be paid.[12] Executive directors remain entitled to be remunerated as a result of their employment with the company. Like non-executive directors, however, they cannot be paid as directors without a constitutional provision or a specific employment contract for being a director.

Section 202A(1) (replaceable rule) of the Australian *Corporations Act 2001* states:

> The directors of a company are to be paid the remuneration that the company determines by resolution.[13]

This provision reflects the need for the members of the company to determine the pay for directors. In some circumstances the company's constitution may provide for directors determining their own remuneration, although this is not common.[14]

If directors were left to decide their own remuneration there would be greater risk that they might not reflect the best interests of the members.[15] Such risks materialised in the

[11]"Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company's assets, unless authorised so to do by the instrument which regulates the company or by the shareholders at a properly convened meeting." *Re George Newman & Co* [1895] 1 Ch 674 at 686.

[12]"But what is the remuneration of directors?...It is a gratuity… In some companies there is a special provision for the way in which directors should be paid, in others there is not. If there is a special provision… you must look to the special provision to see how to deal with it. But if there is no special provision their payment is in the nature of a gratuity." *Hutton v West Ry Co* (1883) 23 Ch D 654 at 672.

[13]*Corporations Act 2001* (Cth) of Australia. Decisions relating to the remuneration for the managing director are usually determined by the board. Section 201J (replaceable rule) of the *Corporations Act 2001* states, "The directors of a company may appoint 1 or more of themselves to the office of managing director of the company for the period, and on the terms (including as to remuneration), as the directors see fit." *Corporations Act 2001* (Cth) of Australia.

[14]See *Hutton v West Ry Co* (1883) 23 Ch D 654 and *Nell v Atlanta Gold and Silver Consolidated Mines* (1895) 11 TLR 407.

dramatic spike in directors' remuneration, particularly in the US, in the 2004-8 period.[16] Executive pay has been vigorously debated during this time and has become increasingly controversial with the advent of the global financial crisis.[17]

Section 202A(2) (replaceable rule) of the *Corporations Act 2001* provides for the company paying for the directors' travelling expenses that relate to being a director.[18]

Members are empowered under s 202B(1) to obtain information about directors' remuneration. Provided members have at least 5% of the votes that may be cast at a general meeting, or 100 members eligible to vote at a general meeting, the company must disclose the directors' remuneration.[19]

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[15]This is an increasingly sensitive area of corporate governance in the wake of the Enron, HIH, WorldCom and Tyco collapses and the more recent demise of Lehmann Bros and the associated global financial crisis. "The primary complaint against excessive executive compensation is that in many cases – despite the mantra of pay for performance – executive pay simply does not correlate with performance." Feinerman JV, "New Hope for Corporate Governance in China?" in Clarke DC, *China's Legal System: New Developments, New Challenges* (Cambridge, Cambridge University Press, 2008) at 55.

[16]"There has been recent uproar over excessive executive pay. Directors face increased scrutiny… in the US, there is shareholder litigation over exorbitant remuneration awarded to directors on the vote of their boardroom colleagues on the compensation sub-committee." Corkery JF and Welling B, *Principles of Corporate Law* (Scribblers Publishing, 2008) at 151

[17]"Pledging to take 'the air out of golden parachutes', President Obama announced Wednesday that executives of companies receiving federal bailout money will have their pay capped at $500,000 under a revised financial compensation plan. Last year's 'shameful' handout of $18 billion in Wall Street bonuses 'is exactly the kind of disregard for the costs and consequences of their actions that brought about this crisis: a culture of narrow self-interest and short-term gain at the expense of everything else,' Obama said to reporters at the White House. 'For top executives to award themselves these kinds of compensation packages in the midst of this economic crisis isn't just bad taste – it's a bad strategy – and I will not tolerate it. We're going to be demanding some restraint in exchange for federal aid – so that when firms seek new federal dollars, we won't find them up to the same old tricks,' the president added. Under Obama's plan, companies that want to pay their executives more than $500,000 will have to do so through stocks that cannot be sold until the companies pay back the money they borrow from the government. The rules will be implemented by the Treasury Department and do not need to be approved by Congress." See http://www.cnn.com/2009/POLITICS/02/04/obama.executive.pay/index.html visited Friday 15 May 2009. Although this comment is in the context of the financial crisis it refers directly to executive pay practices and decision making being responsible for the crisis.

[18]"The company may also pay the directors' travelling and other expenses that they properly incur: (a) in attending directors' meetings or any meetings of committees of directors; and (b) in attending any general meetings of the company; and (c) in connection with the company's business." Note 13.

[19]*Corporations Act 2001* (Cth) of Australia. Section 202B(1) also states: "The Company must disclose all remuneration paid to the director, regardless of whether it is paid to the director in relation to their capacity as director or another capacity." Ibid.

The *Corporations Act 2001* also provides further special rules for listed companies. Section 300(11) states:

> The report for a listed company must also include the following details for each director:
>
> (a) their relevant interests in shares of the company or a related body corporate;
>
> (b) their relevant interests in debentures of, or interests in a registered scheme made available by, the company or a related body corporate;
>
> (c) their rights or options over shares in, debentures of or interests in a registered scheme made available by, the company or a related body corporate;
>
> (d) contracts;
>
> (ii) to which the director is a party to under which the director is entitled to a benefit; and
>
> (iii) that confer a right to call for or deliver shares in, or debentures of or interests in a registered scheme made available by the company or a related body corporate;
>
> (e) all directorships of other listed companies held by the director at any time in the 3 years immediately before the end of the financial year and the period for which each directorship has been held.[20]

[20]Ibid.

Further to this provision the *Corporations Act 2001* outlines specific information that must be provided by listed companies in the annual directors' report. This report must include a separate and clearly identified section that details a discussion of the board policy for determining remuneration of key management. The report must also discuss the relationship between the board policy and the company's performance.[21]

10.3 Directors and service contracts

For executive directors who are employees of the company as well as directors, service contracts usually outline their salaried employment. Directors are not normally contracted but receive a fee for being a director. Directors per se are not employees of the company.[22] Thus, executive directors who are employees will earn a salary for their management role, separate from their fees for being a director. The chief executive is usually the leader of the management or executive staff and may also be referred to as the managing director or general manager or CEO of the company.

In the past there was a view that the role of director was incompatible with being an employee of the same company.[23] However, today it is accepted practice that a director can have a dual role.[24] As outlined previously, "'executive director"' is an

[21]See Section 300A (1). Ibid.
[22]See *Hutton v West Cork Railway Co* (1883) 23 Ch D 654 at 671-672.
[23]See *Normandy v Ind Coope & Co Ltd* [1908] 1 Ch 84 at 104 and *Lee Behens & Co Ltd* [1932] 2 Ch 46 at 53.
[24]See *Lee v Lee Air Farming Ltd* [1961] AC 12 Privy Council. Lord Morris states, "The substantial question which arises is… whether the deceased was a 'worker' within the meaning of the Workers Compensation Act 1992 (NZ), and its amendments. Was he a person who had entered into or worked under a contract of service with an employer? The Court of Appeal thought that his special position as governing director precluded him from being a servant of the company. On this view it is difficult to know what his status and position was when he was performing the arduous and skilful duties of piloting an aeroplane which belonged to the company and when he was carrying out the operation of top-dressing farm lands from the air. He was paid wages for so doing. The company kept a wages book in which these were recorded. The work that was being done was being done at the request of farmers whose contractual rights and obligations were the with the company alone. It cannot be suggested that when engaged in the activities above referred to the deceased was discharging his duties as governing director. Their Lordships find it impossible to resist the conclusion that the active aerial operations were performed

acknowledged category of director and refers to those directors who are employed by the same company.

10.4 Loans to directors

Another area that relates to a director's fiduciary duty to the company is company loans to directors. This is similar to self-dealing, in that directors should not place the company at risk while personally gaining. There is no valid reason for a director to seek a loan from the company. Loan facilities exist elsewhere and directors owe the company the full benefit of their skill and experience, devoid of any conflicts of interest.[25]

> Many countries have banned all such loans to directors. Such transactions are inherently open to abuse. Why should a director borrow from her own company, unless she expects soft terms, which by definition are not in the company's best interest?[26]

In Australia, there are provisions for related party transactions in the *Corporations Act 2001*. Sections 207-230 outline the need for member approval for financial benefit, consequences of breach, exceptions to the requirement for member approval and the

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because the deceased was in some contractual relationship with the company. That relationship came about because the deceased as one legal person was willing to work for and to make a contract with the company which was another legal entity. A contractual relationship could not only exist on the basis that there was consensus between two contracting parties…." at 24 and 25. See also *Anderson v James Sutherland (Peterhead) Ltd* [1941] SC 203 at 218.

[25]This area has been highlighted in a recent case in Australia following investigations into the Allco group. "An investment vehicle owned by senior executives in Allco Finance Group was given a $50million loan by the financial engineer to protect it from margin calls, the administrator McGrathNicol has revealed today…. 'We are currently undertaking a review of the terms of the loan and circumstances surrounding its grant to APT (Allco Principals) with a view to determining whether any action may be brought'… the loan could be potentially investigated by the Australian Securities and Investments Commission on the grounds Allco Finance failed to disclose it to the share market. It also failed to obtain shareholder approval for the transaction." Scott Rochfort "Allco loan to directors' trust eyed" *Sydney Morning Herald March* 12, 2009.

[26]Note 16 at 251 and 252.

procedures for obtaining member approval. The essence of these provisions is that member approval is required to give a financial benefit to a related party of a public company, unless specific exceptions apply. Member approval is not required for minor transactions under $5000 (aggregated over a financial year).[27]

10.5 Conclusion

The directors' financial relationship with the company is an important one. Firstly, the directors must be acting in the best interests of the company and avoiding self-dealing, unless given prior permission to do so by the shareholders.

Secondly, the remuneration of directors should be known and agreed to by the shareholders. Directors' deciding their own remuneration is an arrangement fraught with the propensity for abuse. Owners ought to be concerned about this practice and should insist on total transparency from the directors.

Vietnam should consider revising its provisions to give more protection to owners and clarity for directors around the issue of directors' remuneration. Loans to directors from the company should be made illegal.

[27]See *Corporations Regulation (Simpler Regulatory System) Act* 2007.

Chapter Eleven

Remedies and Enforcement of Directors' Duties

11.1 Introduction

For directors' duties to have any meaning they must be supported by sanctions in the event they are breached. Within this context there is a range of possible remedies that can be considered. Remedies need to take account of the various disputes that often arise within companies. Here again, the constant problems of controlling agency costs provide the main points of conflict. The agency problem could find shareholders in disputes with the company, management or with other shareholders.[1] If the shareholder is part of the majority this situation is less complex. Minority shareholders, however, often have limited ability to take action against any injustices.[2]

11.2 The *Law on Enterprises 2005*

In Vietnam, the *Law on Enterprises 2005* outlines measures to protect minority shareholders and investors.[3] These measures do not include the ability to initiate proceedings (except for limited liability companies with two or more members) and largely concentrate on the rights to attend meetings and the passing of resolutions.

[1] For more see Keay A, "Company Directors Behaving Poorly: Disciplinary Options for Shareholders" (2007) September *Journal of Business Law* 656.

[2] As Welling states, "Simply saying that a shareholder has certain rights won't work. The old adage 'where there's a right, there's a remedy' has, in logic, only one practical interpretation: the fact that no remedy can be found indicates that the supposed right was imaginary." Welling B, *Corporate Law in Canada 3rd Edition* (Scribblers Publishing, 2006) at 494.

[3] The *Law on Enterprises 2005* does not define major or minor shareholders. Provisions for shareholders are outlined in Articles 79 and 80. See National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005*. The *Securities Law 2006* defines majority shareholder as a shareholder holding directly or indirectly at least 5 per cent of shares that are entitled to vote. See National Assembly, Socialist Republic of Vietnam, *Securities Law 2006* at Article 6(9).

The exception for limited liability companies with two or more members is outlined in Article 41 (1(g)) which states:

> A member of a limited liability company with two or more members shall have the following rights: To make a complaint or commence a Court action against the director or general director in the event that the director or general director fails to perform fully his or her obligations and causes damage to the interests of such member or of the company in accordance with law.[4]

In a shareholding company in Vietnam, any shareholder or group of shareholders who have more than 10% of the total number of ordinary shares, having held them for consecutive period of six months or more, is able to:

1) request the convening of a General Meeting of shareholders where;
a) the Board of Management makes a serious breach of rights of shareholders, obligations of managers or makes a decision which falls outside its delegated authority;
b) the term of the Board of Management has exceeded six months and no new Board of Management has been elected to replace it; and
2) request the Inspection Committee to inspect each particular issue relating to the management and administration of the operation of the company where it is considered necessary.[5]

[4]See National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005* at Article 41. For the measures pertaining to shareholders rights at meetings see National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005* at Articles 79 and 80.
[5]Ibid. Article 79.

If the Board of Management fails to call a shareholders' meeting within 30 days of receiving the request, the Chairperson of the Board of Management is personally responsible to the company for any ensuing damages and the Control Board is thereby empowered to convene the meeting of shareholders. If the Control Board fails in its duty to convene the meeting, then the Chairperson of the Control Board is personally liable to the company for any ensuing damages resulting from this failure to act. The shareholders who have requested the meeting retain the right to call a shareholders' meeting and the company is liable for the debt incurred for the meeting.[6]

11.3 Minority shareholders

In Australia the Court is empowered to act on behalf of minority shareholders in certain circumstances. Section 232 of the *Corporations Act 2001* outlines the oppression remedy and lists the grounds whereby the Court can make an order pursuant to oppressive conduct of affairs.[7] The orders available to the Court in this situation are outlined in s 233 and include the winding up of the company.[8]

In China the company law provides some protection for minority shareholders in Article 20:

[6]Ibid. Article 97.
[7]Section 232 states: "The Court may make an order under section 233 if: (a) the conduct of the company's affairs; or (b) an actual or proposed act or omission by or on behalf of a company; or (c) a resolution, or a proposed resolution, of members or a class of members of a company; is either: (d) contrary to the interests of the members as a whole; or (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity. For the purposes of this Part, a person to whom a share in the company has been transmitted by will or by operation of the law is taken to be a member of the company." *Corporations Act 2001* (Cth) of Australia.
[8]Ibid.

> Where any of the shareholders of a company causes any loss to the company or to other shareholders by abusing shareholder's rights, it shall be subject to compensation.[9]

This provision equates to a fiduciary duty between major shareholders and minor shareholders and is further supported by Article 152 which supports any shareholder "[to sue] any person who encroaches on the lawful rights and interests of the company and causes losses to the company".[10] Article 152 provides a mechanism for minor shareholders in China to take action against both directors and major shareholders in the best interests of the company. In order for shareholders to use Article 152, they must hold at least 1% of the total number of shares in the company for a minimum of 180 days. Furthermore, in an attempt to preserve the basic principle that it is the directors, not the shareholders, who manage the company, and to guard against litigious shareholders, Article 152 specifies that the minority shareholders must first make a demand on the company.[11]

These provisions are more robust and accessible than the Vietnamese regulations, and provide stronger protection for minority shareholders.

11.4 Oppression

The *Corporations Act 2001* does not define oppression. In *Wayde v New South Wales Rugby League Ltd ("Western Suburbs Case")* the Court held that oppression entails a

[9]People's Republic of China *Company Law 2005*.
[10]Ibid. For more on this see Clarke DC, *China's Legal System: New Developments, New Challenges* (Cambridge, Cambridge University Press, 2008).
[11]Ibid.

consideration of unfairness.[12] The adverb "unfairly" in the s 232 test dominates the test; it is the critical question. In summary, a controller is oppressive if he or she acts unfairly.

The provisions outlined in s 232 specifically state that an omission by or on behalf of the company is enough to provide grounds for the Court to make an order under s 233.[13] Furthermore, pursuant to s 232(d), the Court can make an order under s 233 where a resolution, or proposed resolution of members, or a class of members is contrary to the interests of the whole.[14] Oppression therefore is not restricted to the minority.[15]

11.5 The 'proper plaintiff'

> One of the most elementary rules in our legal system is that one person can't sue on the basis of an injury suffered by someone else. Only the

[12]"Brennan J states; "At a minimum, oppression imports unfairness and that is the critical question in the present case" *Wayde v New South Wales Rugby League Ltd ("Western Suburbs Case")* (1985) HCA 68 at para 5. Brennan J describes the parameters entailed in the context of directors; "The Court must determine whether reasonable directors, possessing any special skill, knowledge or acumen possessed by the directors and having in mind the importance of furthering the corporate object on the one hand and the disadvantage, disability or burden which their decision will impose on a member on the other, would have decided that it was unfair to make that decision." *Wayde v New South Wales Rugby League Ltd ("Western Suburbs Case")* (1985) HCA 68 at para 6.

[13]Section 232(b). Note 7.

[14]This clause remains unclear regarding what constitutes the interests of the members as a "whole". Section 232(d). Ibid.

[15]The application of s 233 is open to those specified in s 234 which states: "An application for an order under section 233 in relation to a company may be made by: (a) a member of the company, even if the application relates to an act or omission that is against: (i) the member in a capacity other than as a member; or (ii) another member in their capacity as a member; or (b) a person who has been removed from the register of members because of a selective reduction; or (c) a person who has ceased to be a member of the company if the application relates to the circumstances in which they ceased to be a member; or (d) a person to whom a share in the company has been transmitted by will or by operation of law; or (e) a person whom ASIC thinks appropriate having regard to investigations it is conducting or has conducted into: (i) the company's affairs; or (ii) matters connected with the company's affairs."

injured party has standing to complain, absent a statutory rule to the contrary.[16]

The 'proper plaintiff' rule at common law means that proceedings for a breach of duties are limited to the company. Historically, the ability of a shareholder to sue either directors or majority shareholders is restricted by the 'proper plaintiff' rule. The basis of this rule resides with companies having legal personality at incorporation. The 'proper plaintiff' rule has been supplemented by a number of judicial exceptions and the advent of further statutory provisions.[17]

11.6 Statutory derivative action

The statutory derivative action[18] enables a shareholder or director to act on behalf of the company to prosecute those who have wronged the company, in circumstances

[16]Welling B, *Corporate Law in Canada 3rd Edition* (Scribblers Publishing, 2006) at 503.

[17]"… common law exceptions to the proper plaintiff rule were abolished by the Corporate Law Economic Reform Program Act 1999 ('CLERP Act'). Thus the company continues to be the proper plaintiff in proceedings for wrongs against it and it will only be where a member's personal rights have been affected by the breach that the member can litigate in his or her own right. The most fundamental change to this area of corporations law was the introduction of statutory derivative action by the CLERP Act. This statutory derivative action is complemented by other statutory forms of relief extended to, *inter alia*, oppressed minority shareholders." Cassidy J, *Concise Corporations Law 5th Edition* (Sydney, The Federation Press, 2006) at 300.

[18]"The term 'derivative action' is American. It is used there to describe a common law (not statutory) action brought, usually by a shareholder, on behalf of a corporation to redress a wrong done by the corporation. The adjective 'derivative' is used to describe the nature of the shareholder's right to sue. As the cause of the action belongs to the corporation, the principle of corporate personality ordinarily would prevent the shareholder suing. However, American judges have cut through this technical difficulty (by what authority is unclear) and looked at the economic reality of the situation. They noted that the shareholder is *effectively* prejudiced, in that any corporate loss is likely to be reflected in lower share prices or lower dividends. Consequently, they invented a second-level right in the shareholder, 'derived' through the corporate entity, to sue the wrongdoer… The English Courts have now discovered the 'derivative action', an action (like its American counterpart) that it is neither statute based nor statute controlled. The Canadian Courts have adopted the label. However, Canadian judges who use the label are using it to describe the statutory representative action brought by a complainant under a Canadian corporate statute. Canadian lawyers and judges aren't talking about a shareholder's right derived through the corporation and limited by ordinary principles of corporate law; they are misusing the American term 'derivative action' to describe a right derived from the statute, a right limited by extraordinary statutory rules. I find it difficult to use the term as carefully as I should like to, so I don't use it at all." Note 16 at 526,527 and 528. For more see Choo PKM, "The Statutory Derivative Action in Singapore – A Critical and Comparative Examination" (2001) 13 *Bond Law Review* 64; Huang H, "The Statutory Derivative Action in China: Critical Analysis and

where the company is unable or unwilling to undertake legal proceedings of its own. Usually, action on behalf of the company is decided upon, and undertaken, by directors. In some cases, however, particularly when the directors themselves have wronged the company, shareholders need the ability to prosecute.[19]

From the corporate governance point of view the key is to find the right balance between a measure that provides a meaningful opportunity for shareholders to take action where appropriate and a mechanism that is too prone to abuse by shareholders. On one hand, shareholders need to be able to take proper action in appropriate circumstances where the company is suffering, and on the other, directors need to be free from constant litigation in order to run the company. If directors are complying fully with their respective duties shareholder remedies are not going to be utilised and agency costs will be minimised. Unfortunately, this is not always how companies work and shareholder remedies often form an important part of governance models.[20]

Of course, the alternative option to shareholders taking action is for the shareholders to simply leave the company and sell their shares.[21] Leaving the company may have

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Recommendations for Reform" 2008 *University of New South Wales Faculty of Law Research Series* Paper 46; Hofmann M, "The Statutory Derivative Action in Australia: An Empirical Review of its Use and Effectiveness in Australia in Comparison to the United States, Canada and Singapore" (2005) *Bond University Corporate Governance eJournal*.

[19]This does not refer to a member's common law personal actions. As Corkery and Welling state: "An action personal to the shareholder would, for example, arise when a corporate director smashed into the shareholder's car. It would be irrelevant to the shareholder's tort action over the crash that the defendant was a corporate director." Corkery JF and Welling B, *Principles of Corporate Law* (Mudgeeraba Qld, Scribblers Publishing, 2008) at 322.

[20]There is a debate about the relative merits of the derivative action. See Coffee JC and Schwartz DE, "The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform" (1981) Vol 81 *Columbia Law Review* 261; Ramsey I, "Corporate Governance, Shareholder Litigation and the Prospects for a Statutory Derivative Action" (1992) Vol 15 *UNSWLJ* 149; Fischel DR and Bradley M, "The Role of Liability Rules and the Derivative Suit in Company Law: A Theoretical and Empirical Analysis" (1983) 71 *Cornell Law Journal* 261; Whincop MJ, "The Role of the Shareholder in Corporate Governance: A Theoretical Approach" (2001) *Melbourne University Law Review* 418.

[21]"…shareholders use the 'exit' option far more commonly because it is impersonal, cheaper, and faster. Voicing one's concerns, on the other hand, is usually more expensive, requires time and

adverse ramifications for the company as the market may see the exit of shareholders as a signal that the company is performing poorly. On their part, the shareholders forego future profits from the company that was presumably the original reasons for buying their shares.[22]

Historically, the ability for shareholders to take action had been problematic, confounded by the expense of litigation, restricted access to relevant company information and the rule in *Foss v Harbottle*.[23]

11.7 *Foss v Harbottle*

In *Foss v Harbottle* the shareholders claimed that the directors had fraudulently misappropriated company assets and that there was no properly constituted board. The Court held that the injury was to the company and therefore the action could not be brought by Foss and Turton.[24] The decision in *Foss v Harbottle* has its origin in the legal personality of the company and two subsequent rules that flow as a corollary to the company being a separate entity. The first of these rules is the 'proper plaintiff' rule outlined above and the second is the internal management rule.[25]

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planning, and involves some level of face-to-face interaction." Bottomley S, "The Relative Importance of the Statutory Derivative Action in Australia" in Macmilllan F(ed), *International Corporate Law Annual* (Oregon, Hart Publishing, 2003) at 163.

[22]For more see Bottomley S, "The Relative Importance of the Statutory Derivative Action in Australia" in Macmilllan F(ed), *International Corporate Law Annual* (Oregon, Hart Publishing, 2003).

[23]*Foss v Harbottle* (1843) 67 ER 189. Importantly, for this thesis, this discussion is historically specific to the nature of British and Commonwealth company law. This discussion does not assume this history is shared by the Vietnamese as it clearly is not the case. Rather the analysis is for the purpose of explaining an alternative approach to corporate law for the Vietnamese to consider in developing their own laws.

[24]Ibid.

[25]"The Courts long held (1) that company problems should be solved internally by the majority of members and (2) that the company itself, acting through its management, is the proper party to be the plaintiff in such actions. These notions were called the 'internal management principle' and the 'corporate plaintiff principle' respectively. Together they formed what corporate lawyers call the *Rule in Foss v Harbottle*… This is a lengthy footnote in corporate law. Emphasising this Rule in this way will only perpetuate its unnecessary terminology. The main point is corporate personality – the company is a separate entity and can bring actions. The argument is about who can get the company to

11.8 The internal management rule

Lord Davey in *Burland v Earle* outlined the internal management rule as follows:

> There is a principle that the Courts will not interfere in the internal disputes of partnerships, joint stock companies or the modern corporation, the precept that the Courts seek to avoid a multiplicity of actions, [and] that for a wrong done to a company, the company is the proper plaintiff in an action to seek redress.[26]

Although it did abolish *Foss and Harbottle* as a method of seeking derivative suits, the introduction of the provisions for "proceedings on behalf of a company by members and others" in Part 2F.1A of the *Corporations Act 2001* did not vanquish either the proper plaintiff rule or the internal management rule. Instead, these provisions modify the application of the rules. The company continues to be the proper plaintiff in proceedings for wrongdoing against it, with the exception of leave being granted under s 237 or s 233(1)(g) for bringing proceedings on behalf of the company.[27] Likewise the internal management rule still prevails, with the Court's discretion to act under Part 2F.1A tempered by a reluctance to interfere in internal company affairs.[28] Section 53 of *Corporations Act 2001* defines "affairs of a body corporate" in an extensive list.[29]

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bring an action. We know the directors can, because they manage the company. But they will not always be willing to act, because they may be implicated in the problem that demands some sort of action." Note 19 at 320.

[26] *Burland v Earle* [1902] AC 83.

[27] Note 7.

[28] "… the Court's initial consideration of the claim is on the basis of the evidence submitted by the member alone. If the Court does not at this stage think the applicant has established a prima facie case for permission to be granted, the application will be refused. At this initial stage, the company is not a respondent to the application to the Court for permission to continue the claim and so is not required to

In deciding upon whether or not to proceed on matters relating to either the proper plaintiff rule or the internal management rule the Court will take into account the decisions of the general meeting.[30]

Section 236(1)(b) of the *Corporations Act 2001* stipulates that a member undertaking proceedings on behalf of the company, or intervening in proceedings to which the company is a party, must have been acting with leave granted under s 237.[31]

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file evidence or be present at any hearing." Davies PL, *Gower's Principles of Modern Company Law Eighth Edition* (London, Sweet and Maxwell Ltd, 2008) at 620 and 621.

[29]"(a) the promotion, formation, membership, control, business, trading, transactions and dealings (whether alone or jointly with any other person or persons and including transactions and dealings as agent, bailee or trustee) ... (c) the internal management and proceedings of the body; and (d) any act or thing done (including any contract made and any transaction entered into) by or on behalf of the body, or to or in relation to the body or its business or property…(e) the ownership of shares in, debentures of, and interests in a managed investment scheme made available by, the body (k) matters relating to or arising out of the audit of, or working papers or reports of an auditor."

[30]"In practice, the Courts have allowed members to commence proceedings in the company's name if the board has not initiated proceedings. If that member's standing to sue is disputed, and the Court believes there is a prospect that the general meeting will condone the litigation, it will stay proceedings to allow the general meeting to determine whether the proceedings should continue. If the general meeting ratifies the member's actions, the proceedings can continue unaffected by the initial defect." Note 17 at 303. Also with respect to the internal management rule Cassidy states: "While ratification [by the members] does not prevent a successful application for derivative action being made (s239(1)), such ratification may be taken into account in determining application; s239(2). It appears that the legislature's concern is to ensure that the ratification was made by a fully informed meeting, acting for a proper purpose: s 239 (2) (a) and (b)." Note 17 at 304.

[31]Section 237 of the Australian *Corporations Act 2001* states: "(1) A person referred to in paragraph 236(1)(b) may apply to the Court for leave to bring, or to intervene in, proceedings. (2) The Court must grant the application if it is satisfied that: (a) it is probable that the company will not itself bring proceedings, or Properly take responsibility for them, or for the steps in them; and (b) the applicant is acting in good faith; and (c) it is in the best interests of the company that the applicant be granted leave; and (d) if the applicant is applying for leave to bring proceedings – there is serious question to be tried; and (a) either; (i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or (ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied. (3) A rebuttable presumption that granting leave is not in the best interests of the company arises if it is established that; (a) the proceedings are: (i) by the company against a third party; or (ii) by a third party against the company; and (b) the company decided: (i) not to bring the proceedings; or (ii) not to defend the proceedings; or (i) to discontinue, settle or compromise the proceedings; and (c) all of the directors who participated in that decision: (i) acted in good faith for a proper purpose; and (ii) did not have a material personal interest in the decision; and (i) informed themselves about the subject matter of the decision to the extent they reasonably believed to be appropriate; and (ii) rationally believed that the decision was in the best interests of the company. The director's belief that the decision was in the best interests of the company is a rational one unless the belief is one that no reasonable person in their position would hold." Note 7.

To ensure that applicants who are successful in being granted leave to commence or intervene in proceedings do not settle those proceedings to benefit themselves, rather than act in the company's best interest, s 240 specifies that the proceedings, once granted, cannot be later discontinued, compromised, or settled without leave of the Court.[32]

11.9 *Bien Hoa Confectionary Corporation (BIBICA)* case

The Bien Hoa Confectionary Corporation (BIBICA) case is often referred to by others to illustrate, among other things, a lack of transparency and accountability, an inefficient and ineffective regulatory body and insufficient shareholder remedies in current Vietnamese corporate governance.[33]

BIBICA issued five separate reports detailing its profit and loss for the year 2002. Each report gave a different result. The reports ranged from an initial report stating a 8.9 billion Vietnamese dong profit (the only report to state a profit) to a final report stating a 10.086 billion Vietnamese dong loss (report five).[34] This process highlights a problem for auditing and transparent financial accounting. With so many conflicting reports, investor confidence is undermined.[35]

[32]Note 7. Other provisions for Court orders and powers are outlined in s241 and s242. Note 7.
[33]See also Nguyen VT, "Corporate Governance in Vietnam's Equitized Companies" in Ho KL (ed), *Reforming Corporate Governance in Southeast Asia* (ISEAS publications, 2005); Bui HX, "Corporate Governance in Vietnamese Company Law: A Proposal For Reform" (unpublished PhD thesis) La Trobe University 2007 and Minh TL and Walker G, "Corporate Governance of Listed Companies in Vietnam" (2008) Vol 20 No 2 *Bond Law Review* 118.
[34]Ibid.
[35]Ibid. See also "BIBICA delays issuing its shares" <www.vneconomy.vn/58952P7C642/bbc-hoan-phat-hanh-co-phieu.htm>

The BIBICA case also highlights the need for a strong regulator in Vietnam.[36] BIBICA's shares were not suspended from trading, despite the obvious irregularities and accompanying requests from concerned shareholders.[37]

Shareholders, lacking remedies under the law, were left unable to take meaningful action, particularly against the Board of Management and the CEO who were in breach of their duty of care.[38]

11. 10 *FPT Corporation (FPT)* case

The FPT case raised concerns about the directors' financial relationship with the company, conflicts of interest, investor protection, adequate regulation and directors' duties.[39]

FPT was the centre of significant share trading, both within the parent company and in the establishment of several subsidiary companies that did not follow appropriate corporate governance processes.[40] The share dealings undertaken by the FPT Board of

[36]Ibid. See also "Slack regulation, easy to be caught by the 'big fish'" www.vneconomy.vn/58724POC5/dieu-le-long-leo-de-bi-ca-lon-tom.htm.
[37]Ibid.
[38]Ibid.
[39]For more on FPT case see www.vneconomy.vn/?home=detail&page=category&cat_name=01&id=110bacc68e64e8; "What will happen to FPT's Stocks?" www.atpvietnam.com/vn/san_hose/8002/index.aspx; "The fifth selling of stocks case at FPT, the price at minimum decreases." www.aptvietnam.com/vn/diendan/10125/index.aspx.
[40]Ibid. See also "Self-help by redeeming stocks" at www.crmvietnam.com/index.php?q=Tu_cuu_minh_bang_mua_lai_co_phieu.

Management impacted adversely on the share price.[41] The Board also failed to act in the best interest of the company and instead sought to benefit themselves.[42]

The case again highlights the poor protection of investors in the current corporate governance framework in Vietnam. Disclosure of information was unsatisfactory in the FPT case.[43] This case demonstrates why full and proper disclosure is imperative for shareholders' interests. Asymmetrical information held by the Board and acted upon without proper regard for their directors' duties and obligations to the owners exposes the agency problem and adversely affects shareholders.[44] This practice is more problematic when coupled with poor shareholder remedies.

To combat the issues presented in the FPT case strong shareholder remedies and efficient and effective regulation are required. The regulator must be empowered to act on the basis of clear provisions for disclosure and both directors' duties and shareholders rights, in a way that gives confidence to the market.

11.11 *Vietnam Petroleum Transport JSC (VIPCO)* case

The VIPCO case is another example that highlights the need for strengthened investor protections in Vietnam. The case concerned the issuing of shares at different prices

[41]See "Notice of the Shareholder Relations Committee, FPT after communication the internal transaction of six members of the Board of Directors (BOD)" at www.saga.vn/TruyenthongvaPR/PRIR/9983.saga.

[42]"The members of the BOM preferred their own interests over those of the minority shareholders" Minh TL and Walker G, "Corporate Governance of Listed Companies in Vietnam" (2008) Vol 20 No 2 *Bond Law Review* 118 at 181.

[43]Article 27 section 1 of "the Code" states: "A listed company shall be obliged to promptly, completely and accurately announce both periodical and extraordinary information about its business, financial status and corporate governance status to shareholders and the public. Information and the method of announcing information shall be implemented in accordance with law and the company Charter." *Decision Promulgating Regulations on Corporate Governance Applicable to Companies Listed on the Stock Exchange or a Securities Trading Centre* (No 12/2007/QD/BTC) dated 13 March 2007. This provision exists but is not always adequately enforced.

[44]See "FPT: distinguish between shareholders or theory of 'Agency'?" at www.vneconomy.vn/67377P7C708/fpt-phan-biet-doi-xu-co-dong-hay-van-de-ly-thuet-agency.htm.

for State shareholders and other (non-State) shareholders.[45] This practice is in breach of the *Law on Enterprises 2005* and does not reflect good corporate governance.[46]

When the VIPCO Board of Management attempted to pass the resolutions that allowed State shareholders to buy at a reduced price compared to other shareholders they not only breached the law, but created a conflict of interests between shareholders, thereby adversely affecting the shareholders rights as well as the interests of the company.

The VIPCO case further demonstrates the need for a strong regulator that enforces well defined provisions for directors' duties and shareholders' rights that reflect good corporate governance.

11.12 Conclusion

Although the Vietnamese provisions provide certain powers for shareholders, and to a limited extent, minority shareholders, to convene meetings, they fall far short of provisions provided in other jurisdictions.[47] The provisions that do exist are also tied to obligations that the shareholders must meet in order to activate these powers.

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[45]See Vietnam Association of Financial Investors letter number 385/HHDTT "Re: Project of increasing charter capital of VIPCO is contrary to the law" at www.vafi.org.vn/2006/search.php. See also; "VIPCO has completely sold 200.000 HPC stocks" at www.atpvietnam.com/vn/san_hose/7977/index.aspx.

[46]Article 78 Section 5 states, "each share of the same class shall entitle its holder to the same rights, obligations and interests." Note 4.

[47]The *Law on Enterprises 2005* stipulates limited situations where shareholders can enact their powers to call on the Board of Management to convene a meeting. Article 79(3) states: "A shareholder or a group of shareholders stipulated in clause 2 of this shall have the right to request the convening of a General Meeting of Shareholders in the following cases: (a) The Board of Management makes a serious breach of rights of shareholders, obligations of managers or makes a decision which falls outside its delegated authority; (b) The term of the Board of Management has exceeded six months and no new Board of Management has been elected to replace it; (c) Other cases as stipulated in the charter of the company." See Note 4. Article 79(3).

Article 79(3) outlines the requirements that the request for a meeting by shareholders entails. Among other things it states:

> The request must be accompanied by materials and evidence on the breaches of the Board of Management, the seriousness of such breaches, or on the decision which falls outside its authority.[48]

These obligations make it difficult for shareholders to have a meaningful recourse to seek a remedy for a director's breach of duty. Unlike other jurisdictions, the corporate law of Vietnam provides no rights for a Court to intervene and order a meeting of shareholders to take place.[49] Furthermore, the Vietnamese law fails to provide an oppression remedy or a derivative suit procedure, nor a winding up action on just and equitable grounds.

Minority shareholders' rights have been enhanced in the *Law on Enterprises 2005* through the increased ability to call general meetings, the increased numbers required for the general meeting quorum and the threshold for passing resolutions. The idea is that if higher numbers are required for a quorum it is more likely that minor

[48]See Note 4. Article 79(3).

[49]This is different from asking a Court to overturn decisions of a general meeting of shareholders. Article 107 states: "Within ninety (90) days from the date the minutes of the General Meeting of Shareholders are received or the minutes of the results of counting of votes being written opinions from the General Meeting of Shareholders are received, shareholders, members of the Board of Management, the director (or general director) and the Inspection Committee shall have the right to request a Court or an arbitrator to consider and cancel a decision of the General Meeting of Shareholders in the following cases: (1) The procedures for convening the General Meeting of Shareholders did not comply with this Law and the charter of the company; (2) The order and procedures for issuing a decision and the content of the decision breach the law or the charter of the company." See National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005* Article 107. Even with the consideration of this provision, given its limited scope and difficulty of application, it is hardly a strong measure for shareholder redress as some might suggest. "The new LOE 2005 introduced, in principle, the right of shareholders to request the economic Court to overturn GSM decisions." The World Bank, *Report on the Observation of Standards and Codes (ROSC) Corporate Governance Country Assessment Vietnam* June 2006 at 4.

shareholders will be required to participate actively in order for normal business to proceed. However, this provision though is not without its drawbacks. Higher requirements for passing of resolutions may impact upon foreign investment, especially from foreign jurisdictions that have lower requirements for quorum in place or where a simple majority rule applies. Foreign shareholders also have the right to negotiate with other shareholders to establish different requirements for general meeting quorums and the passing of resolutions. This in turn sets up an anomaly whereby companies comprising foreign investors are treated differently from wholly owned Vietnamese companies.

Vietnam has no provision for a shareholder to take action against a director in his or her own right or on behalf of the company.[50] One possible ramification of this is the unfettered oppression of shareholders by dominant directors.[51] There is little or no protection for shareholders under the *Law on Enterprises 2005* from directors who act in an oppressive manner, except the ultimate sanction of voting the directors out of office.[52]

Vietnam could consider reviewing the adoption by China of a Statutory Derivative Action in its *Company Law 2005*. Although China now has a derivative action it did

[50]Notwithstanding the exceptions previously stated that apply to limited liability companies with two or more members. See Article 41. Note 4.

[51]"… shareholders can not sue directors in joint stock companies, based on the rule that the company shall bear the cost of the lawsuit. Shareholders cannot file as suit against directors in the form of class action and derivative actions, which have not yet been introduced in Vietnam." The World Bank, *Report on the Observation of Standards and Codes (ROSC) Corporate Governance Country Assessment Vietnam* June 2006 at 4.

[52]"The independence of the judiciary is limited, and political influence in Court decisions remains persistent, particularly in equitized JSCs, in which the State still holds a significant percentage of shares. In these instances, it may be difficult for minority shareholders to protect their rights against abuse by the majority shareholder or executives/directors through the Court system." The World Bank, *Report on the Observation of Standards and Codes (ROSC) Corporate Governance Country Assessment Vietnam* June 2006 at 4.

not include any oppression remedies in its corporate law framework. This makes the role of the derivative action in Chinese corporate governance more important than in other jurisdictions that combine the remedy with oppression remedies.[53]

[53]For more see Huang H, "The Statutory Derivative Action in China: Critical Analysis and Recommendations for Reform" (2008) *University of New South Wales Faculty of Law Research Series* Paper 46.

Chapter Twelve

Conclusion

12.1 Introduction

At the outset of this thesis there is a discussion about the need for corporate governance measures to be specific to each country's circumstances, sensitive to the political, social and environmental climate of the nation. The discussion concluded that governance measures needed to adequately address company dynamics in a way that provided protection for investors and yet maintained the company's capacity to make independent business judgments and to exercise entrepreneurial flair, within the limits of the law.[1]

> Corporate governance cannot be seen in exclusively legal terms. It transcends law and makes increasing use of a variety of forms of self-regulation, the observance of which is substantially determined by the culture of a particular country.[2]

In the context of this discussion it was also noted that comparative analysis would provide insight as opposed to prescribing solutions. Recommendations have been made as suggestions for further exploration and adaptation in ways that are

[1]"In reality, what shareholders prefer is a less rigid threshold for their investments; the non-restriction of the proportion of any valuable assets or investment sources which can be used as the company's capital; and an unclogged channel and flexible system for shareholders to withdraw their share equity. From the company's perspective, it is totally necessary to operate in a system with a less rigid requirement of a minimum company capital; the proportion of the shareholder's investment; and the withdrawal and buy back of share equity. Under a rigid system of company law legislation, the company's operational costs will be raised and its operational needs will be restricted." Zhao X, "Company Law Reform in China: Its Basic Aims and Values" in Tomasic R (ed), *Corporate Governance: Challenges for China* (China, Law Press, 2005) at 41. See Also American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* Vol 1 (1994) 77.

[2]Farrar JH, "Developing Corporate Governance in Greater China" (2002) Vol 25 No 2 *UNSWLJ* 29 at 30.

appropriate for Vietnam to evolve its own corporate law. That said, there are certain areas that do require attention if one accepts the "law matters" thesis and the OECD principles of corporate governance both as indicators of good governance and as guides to business development, in the new age of sustainability. If the Vietnam reject these indicators of good governance they need to explain why and illustrate how their version is more appropriate in their context and still provides acceptable good governance.

Much of Vietnamese corporate law is borrowed. With the recent emergence of Vietnam as an increasingly important economy on the world stage, particularly in the Asian region, it is time for Vietnam to create its own particular version of good corporate governance.

Vietnam has within its existing framework the platform to be a leader in corporate governance in Asia provided it has the political will. There are an increasing number of signs that Vietnam is serious about corporate governance and that its business sector is well aware of the benefits of corporate governance, embracing as it does directors' powers and duties.[3]

[3]On 17 December 2008, the Vietnam Chamber of Commerce and Industry and the United Nations Development programme announced a two-year initiative to encourage socially and environmentally responsible business behaviour among enterprises in Vietnam. See http://www.undp.org.vn/detail/newsroom/news-details/?contentId=2875&languageId=1. In July 2009 the IFC/World Bank launched its two-year corporate governance program in Vietnam. For more see http://www.ifc.org/ifcext/eastasia.nsf/Content/Vietnam1. Also organisations such as the Vietnam Association of Financial Investors (VAFI) often comment on cases to try to increase awareness of corporate governance. One example of this is the *PetroVietnam Fertilizer and Chemicals* case, about which the VAFI said: "The Government is trying to build up a regime in which the government protects the rights and interests of the investors… when illegal decisions are made, investors lose their trust and may be damaged by the decrease of share prices." See No 432/HHDTTC 17/09/2007 Re: "The Stipulation of PetroVietnam about withdrawal of the 28 hectare land of PetroVietnam Fertilizer and Chemicals JSC is illegal" at www.vafi.org.vn/2006/search.php at 3.

In the ensuing search for its own corporate governance framework, Vietnam needs to remain mindful of the evidence that the "law matters" thesis presents and the guidelines set out by the OECD principles. The content of corporate governance rules is now broadly accepted, as is their encouragement of and dependence on transparency and accountability.[4]

Vietnam should not feel alone in the development of their corporate governance. As in China before them, the journey takes time and persistence. Vietnam could look to the Chinese experience for further input into on how to improve its corporate law. The Chinese have trodden a similar path to that of Vietnam albeit in different shoes. China has provisions that reflect its own cultural, political, economic and legal history and traditions. So, too, Vietnam needs to develop a corporate law framework that reflects the Vietnamese journey and delivers the provisions it requires to address its needs now and into the future.

In 2002, China took the initiative to introduce a new *Code of Corporate Governance For Listed Companies*[5] that was based on the OECD Principles of Corporate Governance.[6] This development was primarily aimed at addressing three key circumstances that prevailed at the time. The first change was a move away from State-owned enterprises into joint stock companies with an accompanying dismantling of the legal apparatus of the State based economy. Secondly, separation of ownership and management control was instituted, which in turn introduced the

[4]"The OECD principles have proved to be influential for corporate governance in a global context. The international organisations such as IMF and the World Bank look to the OECD to provide standards to their assessment criteria. Many OECD countries have adopted the OECD Principles and developed their corporate governance programs. The OECD Principles are also now followed in non-member countries, including China." Xing V, "Corporate Governance In People's Republic of China: A New Code For Listed Companies" (2003) Vol 15 *Bond Law Review* 347 at 360.
[5]People's Republic of China, *Code of Corporate Governance For Listed Companies 2002*.
[6]"The PRC Code embodied the spirit of the OECD Principles." See Note 3.

agency relationship within companies, requiring governance measures to ensure efficiency. Thirdly, the belief began to prevail that corporate governance was central to improving efficiency and order in the stock market.[7]

These circumstances are not dissimilar to what Vietnam is now experiencing, and OECD Principles could again prove a strong platform for Vietnam to benchmark its existing provisions and develop an even stronger governance framework.

This thesis has systematically reviewed the main pieces of Vietnamese legislation that relate to directors' duties. It has analysed and compared them with other proven frameworks, in particular, Australia's *Corporations Act 2001*.

Vietnam should not simply adopt or adapt the Australian laws or any other laws from comparable jurisdictions. Instead, it should look at its own provisions and others, understand the principles behind good governance, be clear about the objectives it is setting out to achieve, and implement measures that are Vietnamese.

Most importantly, Vietnam needs to ensure it continues to build on its capacity for implementation and observance of its existing and emerging corporate governance framework. As Hiscock states:

> There are numerous examples of written laws that look good on paper, but have little effect in practice. This may be because the machinery for setting the law in motion is ineffective… So the change in law

[7]Ibid.

must be accompanied by education of those who are to use the system and to implement it.[8]

When referring to corporate governance in Asia, the OECD also recommended that "sanctions for violations of fiduciary duty should be sufficiently severe and likely to deter wrongdoing."[9] As with China before it, more emphasis needs to be placed on implementation and enforcement of the existing corporate law measures in Vietnam.[10]

Good governance will aid in increasing foreign investment with Vietnam and foster entrepreneurial growth while maintaining transparency and accountability.

12.2 Recommendations – general

Vietnam should review the role and powers of the SSC. Currently it is largely ineffective for enforcement or compliance purposes. Australia's ASIC is worth reviewing for ideas.

Consideration could be given to providing each of the main pieces of legislation in one coherent body of corporate law.

Thought should be given to changing the terms used to reflect more commonly held references, clearly separating out the various stakeholders in the company, i.e.

[8]Hiscock M, "Remodelling Asian Laws" in Lindsey T (ed) *Indonesia Bankruptcy, Law Reform and the Commercial Court* (Desert Pea Press, 2000) at 36-37.
[9]Organisation for Economic Co-operation and Development (OECD), "White Paper on Corporate Governance in Asia" (2003) 53.
[10]"The [PRC] Code emphasized the regulation of controlling shareholders' behaviour, related party transactions, the independence of listed companies, directors' duties, etc." See Note 3 at 366.

directors, board of directors, members, general meeting of members, CEO and management.

Vietnam should clarify the circumstances where members owe duties to the company.

Robust mechanisms are needed that protect both directors and members in situations of dysfunctional boards.

Review of the provisions is suggested in light of providing stronger investor protections and in line with the OECD principles and the “law matters” thesis.

The establishment of truly independent institutions that ensure accountable and transparent corporate governance could be considered. One such body could be an institute of directors.

Another consideration is the establishment of specific Courts for company related matters, with highly trained judges independent of the party system. These Courts would adjudicate on corporate law matters only.

The newly established corporate law Courts could be given specific powers to intervene in corporate matters where appropriate, as is the case in Australia.

Review may be warranted of other processes that lead to legitimate enforcement of and sanctions for breaches of directors’ duties.

Existing provisions that apply for listed companies could be incorporated across other corporate forms.

12. 3 Recommendations - specific

12.3.1 Directors

Vietnam could consider the requirement of a more specific definition of director that encompasses *de facto* directors.

Review of provisions is warranted to allow directors to delegate their duties in more situations other than solely the circumstance of the legal representative leaving Vietnam for thirty days or more.

12.3.2 Meetings

Vietnam should review its meetings provisions to ensure that they represent good governance. The main considerations here would revolve around providing the general meeting with more powers of approval.

Vietnam should further reflect upon the WTO provisions that currently conflict with the *Law on Enterprises 2005.*

12.3.3 Duties

The duty of care, skill and diligence is one of the cornerstone duties for directors. Vietnam needs to develop its duty constructs to reflect an appropriate balance between protection for shareholders on the one hand and entrepreneurial endeavour on the other.

Vietnam could evolve its current duty to the State and combine it with some of the other provisions outlined in Decree 139, to formulate its own framework for corporate social responsibility.

12.3.4 Shareholders

Vietnam should consider reviewing shareholders' powers, especially those of minority shareholders.

The provisions for shareholders to convene meetings should be revisited.

Shareholders have no recourse to remedies for director's breach of duty. This should be reviewed in conjunction with consideration of additional powers for Courts to intervene and grant shareholders a meeting.

Minority and foreign shareholders' rights need to be reviewed. Currently there is an anomaly whereby companies comprising foreign investors are treated differently from wholly owned Vietnamese companies.

Within Vietnam there is no provision for shareholders to take action against directors in their own right or on behalf of the company. One possible ramification of this is the persistent oppression of shareholders by directors and the temptation for directors to feel unrestrained in breaching duties. Under the *Law on Enterprises 2005* there is little

or no protection for shareholders from directors who act in an oppressive or unfair manner, except the ultimate sanction of voting the directors out of office.[11]

12.4 Conclusion

Directors' duties are a novel concept in Vietnam. Whilst they have had the legal provisions to explore directors' duties they have so far done little to apply them meaningfully.

In practice it is common for directors in Vietnam to be given no different treatment to other employees, often being given exactly the same standard employment contract as other staff. Currently, shareholders resort to engaging the police and starting criminal proceedings if they are upset with a director. This usually involves an investigation for fraud and does little for the shareholders or the company.

This thesis and its recommendations form a starting point for Vietnam to consider the direction it wants to take with directors' duties as their economy continues to grow and the need for good corporate governance becomes increasingly important.

[11]Review in this area is also inline with the OECD suggestion that company law should provide provisions for class-action suits for investors. For more see OECD, *White Paper on Corporate Governance in Asia* (2003).

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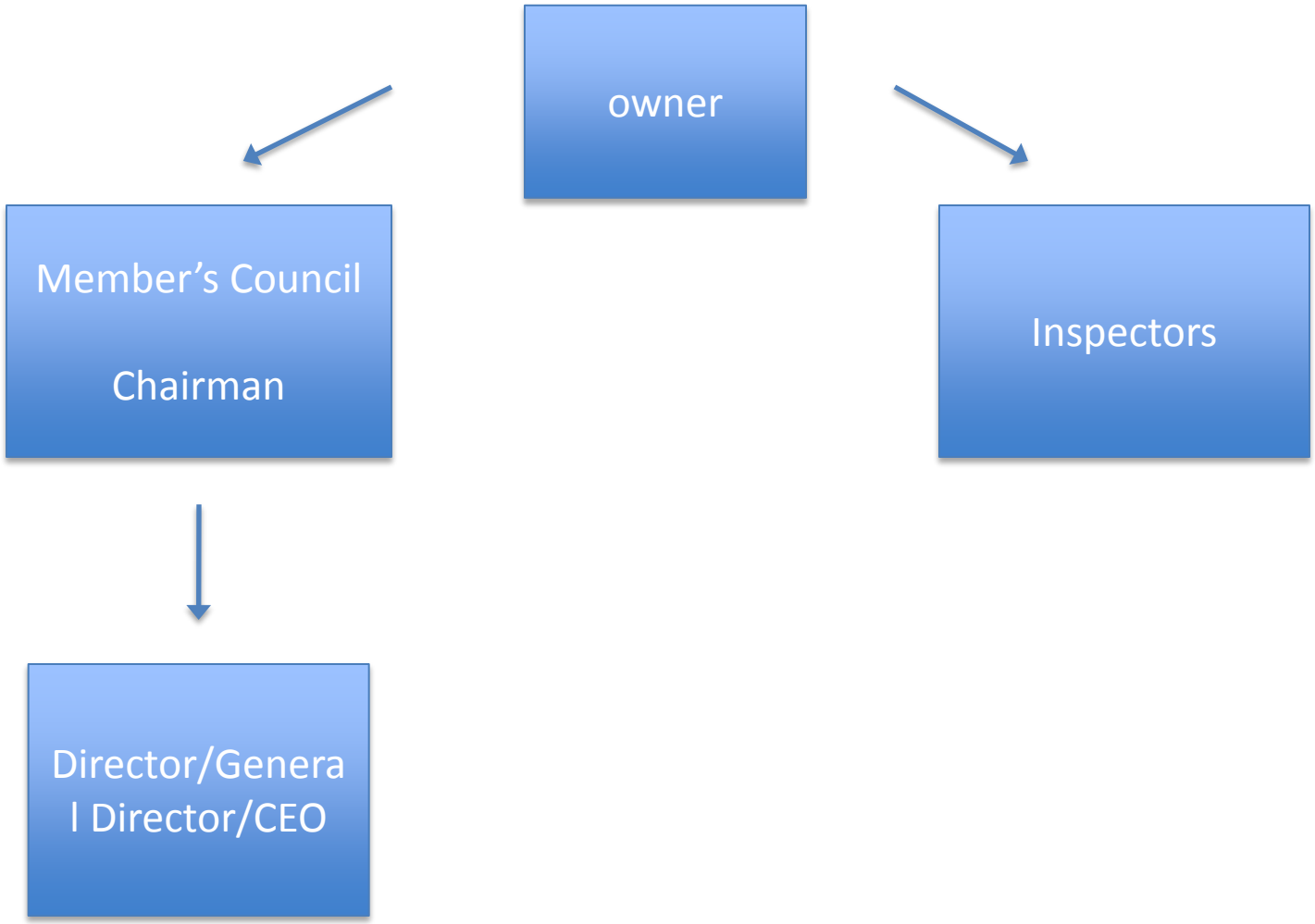
Appendix A

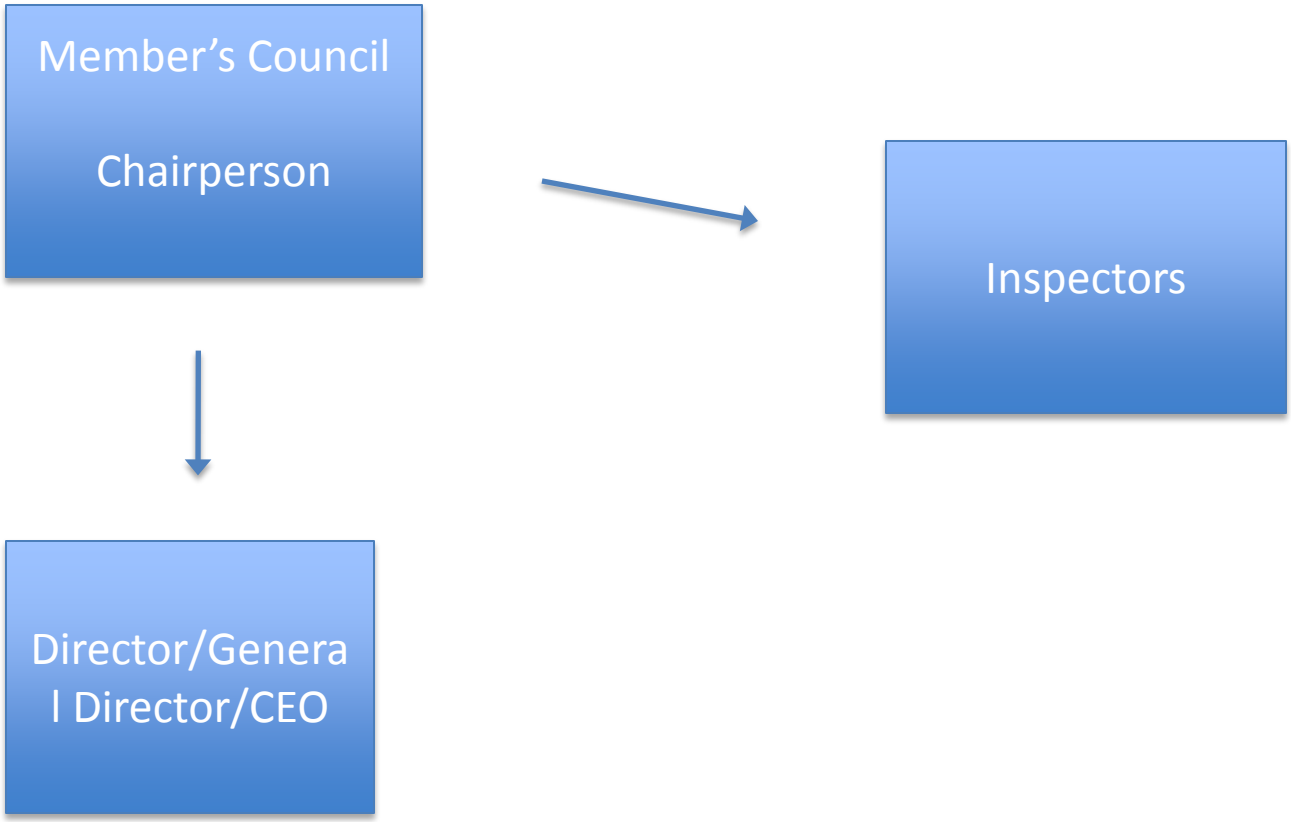
Vietnamese Company Structures

Structure of One Member Limited Liability Company



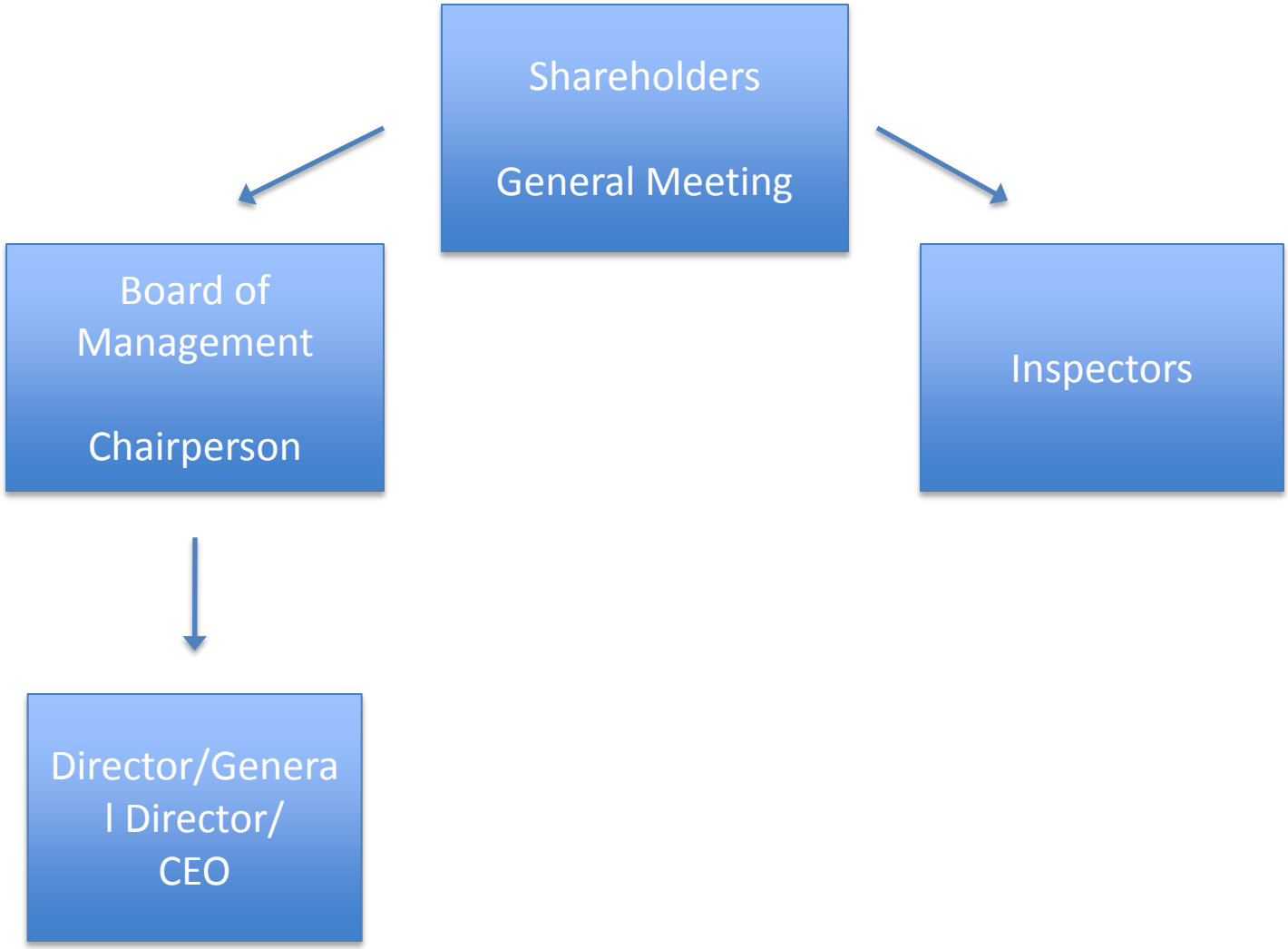
Vietnamese Company Structures

Structure of Limited Liability Companies with Two or More Members



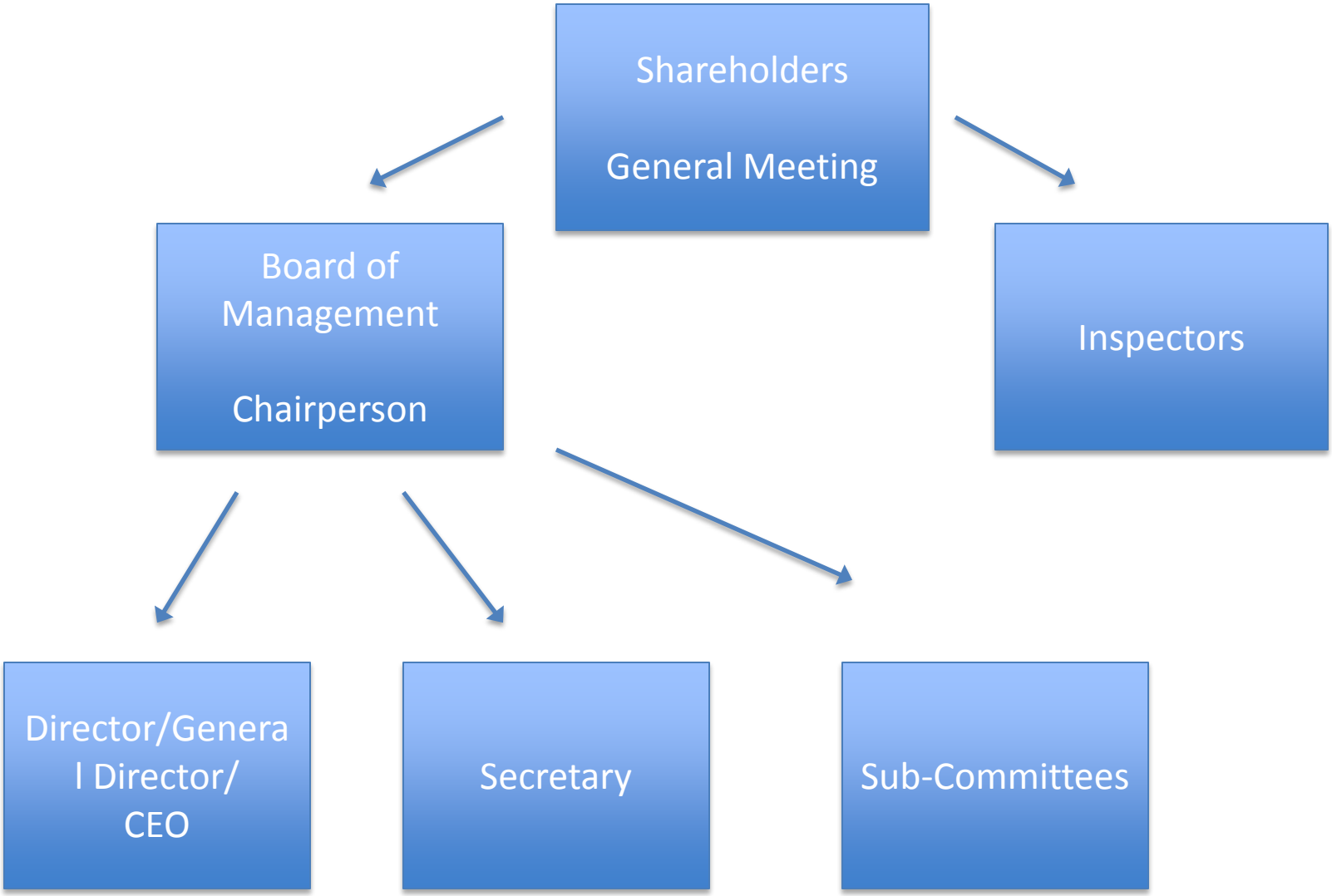
Vietnamese Company Structures

Structure of Shareholding Company



Vietnamese Company Structures

Structure of Listed Company



Appendix B

ROLE OF COURTS IN BUILDING CASE LAW

Le Cong Dinh
Vice-President of the Ho Chi Minh City Bar

Recent rulings of the Ho Chi Minh City court of first instance and the Ho Chi Minh City court of appeals in the case *Park Hyatt Saigon Hotel* among the two foreign co-owners, United Concord International (UCI) and Radiant International Limited (RIL), set a landmark precedent in Vietnam's corporate law and, from the viewpoint of policy makers, touch an essential issue, *i.e.* role of courts in building case law, in the judicial reform program designed and performed by the Vietnamese government.

In the tradition of western jurisdictions, supreme court takes a key role in setting precedents, which exist simultaneously with, and significantly contribute to the interpretation of, the written laws enacted by the parliament.

However, Vietnam, as many other countries in the previous Soviet bloc, does not accept and adopt the concept of case law as a source of law. Judgments rendered by courts do not form a source for written law interpretation. Although some judgments set precedent with great impact on the development of laws, inferior courts do not always and are not forced to take paths of judgment as may be designed from time to time by the supreme court in its conclusive rulings.

In the recent case *Park Hyatt Saigon Hotel*, for example, in connection with the 2005 Law on Enterprises, both UCI, the plaintiff, and RIL, the defendant, disagreed on the legal issue as to whether certain major decisions made by the board of directors of a joint venture company require unanimous votes of board members.

Such issue was raised in a dispute on the dismissal by written board resolutions of the chairman of the board and the general manager of Grand Imperial Saigon Hotel (GISH), the joint venture company among UCI and RIL as foreign partners, and Saigon Construction Corporation (SCC) as Vietnamese partner. UCI referred its complaint to both the Ho Chi Minh City court of first instance and the Ho Chi Minh City court of appeals for adjudication.

The background of the case relied on the charter of GISH, which was drafted in accordance with the former foreign investment laws. The old legislation was enacted in the spirit of protecting interests of local parties which usually held minor equity stakes in joint venture companies with foreign investors. Such protection required unanimous votes for all board resolutions on amendment of the charter, dissolution of the company, or replacement of the chairman of the board and the general manager of the company. This is to say, a quorum of 100% approving votes is required to pass such board resolution.

In an attempt to enhance corporate laws to attract more foreign investors to Vietnam, the national assembly of this country adopted in 2005 a new law on enterprises, which is known as the 2005 Law on Enterprises and came into effect since July 1, 2006. One of the major changes made by this new law is the applicability of the 'unanimous principle' in relation to board resolutions.

It seems that such unanimous principle needs to be viewed from another angle, and this led to arguments among legal practitioners and government officials. Article 52 of the 2005 Law on Enterprises reads that the minimum quorum for voting board resolutions is 51%, but 'a specific quorum shall be agreed by the parties in the charter [of the company].' Professional opinions were split on the questions whether 51% is a fixed quorum for all board resolutions, and whether the unanimous principle is no longer applicable.

Upholding arguments of the defendant, the HCMC court of first instance interpreted Article 52 of the 2005 Law on Enterprises in a strict sense by ignoring the wording 'a specific quorum shall be agreed by the parties in the charter [of the company].' In other words, the judges of the HCMC court viewed 51% as a fixed quorum for all board resolutions and restricted shareholders from exercising their right to negotiate and agree on a flexible quorum other than 51% in voting board resolutions.

The court of appeals, however, overturned the judgment of the HCMC court of first instance on the ground that the unanimous principle adopted by the parties in GISH's charter is not contrary to provisions of Article 52 of the 2005 Law on Enterprises, because such article allows the parties to freely select a quorum equal to 51% or more. The court of appeals concluded that the 2005 Law on Enterprises does not abandon the unanimous principle, but simply not maintain its compulsory applicability in certain major matters as required by the old legislation. This is to say, all agreements on the quorum reached under the old legislation remain valid if they are not in conflict with the 2005 Law on Enterprises, i.e. not lower than 51%.

The new precedent set by the court of appeals affirmed the fairness of the 2005 Law on Enterprises, which does not give the veto right derived from the unanimous principle to minor shareholders although if the parties so agree on a voluntary basis, such agreement remains to be well respected and enforced. Thus, on one hand, law makers are quite flexible in creating favorable conditions for shareholders of newly-established companies to mutually reach their consent instead of imposing a fixed quorum for voting; on the other hand, the new legislation shows its respect to the historical development of business law by maintaining the validity of the unanimous principle in case the parties could not reach other agreements to modify the existing quorum.

The common development of a legal system indeed needs case law for the purpose of clarifying vague and unclear provisions of law which the legislative body unintentionally makes from time to time in the law enactment process. No institution other than the courts

is empowered to interpret laws. Having recourse to the executive bodies in order to seek guidelines on law interpretation should be suspended because those bodies have no such power, and such guidelines have no binding effects. Of such great significance, the case *Park Hyatt Saigon Hotel* truly attracts attention to a need for recognition of case law in the further development of the legal system in Vietnam.

Saigon Park Hyatt Hotel:

United Concord Internationl LTD (UCI) sues Radiant Investments LTD (RIL) requiring to cancel the resolutions which were passed illegally

(09:32 – 26th Sept. 2007)

The jury of people's Supreme Court reconsiders: the first case no. 531/2007/KDTM-ST on April 4th 2007 at HCMC People's court claimed about the forms, contents, conditions (principle through resolution) were valid. This conclusion of the first case is unjustified, not complied the contract and rules of GISH as well as the Vietnam 2005's business law is not right, and need to be editedthe whole case again.

The plaintif's requirement is accepted that the validity of the three resolutions is not recognized. They were signed by RIL board representatives and Sai Gon construction Company on August 10th, 20th, and 22nd in 2006 such as the legal resolution of GISH Board of Directors (including Resolution of reregistration; Resolution of Chairman of Board of Directors and resolution of general directors). Mr. Nguyen Van Hao is the board president and also the general director of Grand Imperial Saigon Ltd. Mr. Nguyen Van Hao doesn't have to hand over related work to Mr. Jaya J.B Tan and Mr. Paul Wong.

Sentence no. 82/2007/KDTM-PT on August 28th 2007

Demanding to cancel the approved resolutions through opinions taking by text

Plaintif: United Concord Internationl LTD (UCI)

Defendant: Radiant Investments LTD (RIL)

Persons who have concerned obligation and interests:

1/ Sai Gon Construction Company

2/ Mr. Nguyen Van Hao

3/ Mr. Jaya J.B Tan (Dato'Jaya J.B Tan)

REMARK:

The plaintif states:

Grand Imperial Saigon hotel Ltd. (GISH) with headquater at 101 Hai Ba Trung, Dist. 1, HCMC is a joint enterprise founded and operated according to the Vietnam law with investment license no. 908/GP issued by State Committee for Co-operation and Investment on July 6th 1994 and the license adjusted in 1995, 1997, 2002 and 2005.

According to the adjusted investment license, persons who have concerned obligation with GISH include:

Vietnam: Sai Gon Construction Co.

Overseas/Foreign:

- United Concord International Ltd (UCI) Representative President, Mr. Nguyen Van Hao
- Radiant Investments Limited (RIL) Representative President, Mr. Jaya J.B Tan

According to the certificate no. 1692/KHĐT-DN on April 4th 2006 of Ho Chi Minh City Department of Planning and Investment, the Chairman of Board of Directors and the General Director positions of GISH were in charge by Nguyen Van Hao.

However, RIL and Mr. Jaya J.B Tan tried to change illegally those positions of Mr. Nguyen Van Hao in GISH by giving out suggestion to foreign UCI and Vietnam SGC signed the "Board of directors Resolution" with the following contents:

- Resolution in text instead of Board of Directors meeting about updating regulations.
- Resolution in text instead of Board of Directors meeting about replacing the Chairman of Board of Directors.

- Resolution in text instead of Board of Directors meeting about replacing the General Director.

Those resolutions are all signed by members of RIL Management Board representatives on August 10th 2006 and SGC Management Board representatives on August 22nd 2006.

On Sept. 30th 2006, UCI Management Board representatives announced the rejection and disagreement on those 3 resolutions.

On Oct. 4th 2006. Mr. Jaya J.B Tan faked to be "The Board Chairman" sending newsletter to the joint-ventures and members of the Management Board to give notice about replacing personnel changes and summon a board meeting on Oct. 17th 2006 in order to ask Mr. Nguyen Van Hao hand out office, company seal, and GISH related documents to Mr. Jaya J.B Tan and Paul Wong, while getting prepared to re-register the company by the decisions above.

Because those decisions above were not accepted by the UCI members of Board of Directors as the principle of agreement in regulation term 8.3.1 of GISH regulations, it was invalid. Therefore, UCI drawn up petition to sue RIL, requiring the Court:

- To cancel the legal validity of three resolutions that RIL and SGC Board of Representative Directors members signed on August 10th 2006 and August 22nd 2006, including: Resolution on the regulations, the Resolution of President of the Board, and the Resolution of the General Director.
- To cancel or not to accept the legal validity of documents signed by Mr. Jaya J.B Tan on Oct. 4th 2006 about announcement of changing the Chairman of Board of Directors and General Director and holding a board meeting on Oct. 17th 2006.

The Defendant present:

- Not accepting all the requirements of the plaintif.

- Demanding the court to recognize the legal validity of those resolutions mentioned above.

- Demanding the court to force Mr. Nguyen Van Hao to hand over all the related work to the new Chairman of GISH, Mr. Jaya J.B Tan and the new general director of GISH, Mr. Paul Wong.

Persons who have concerned obligation and interests present:

- Mr. Nguyen Van Hao: no independent demand but consistent with comments and requests of the plaintiff. Handing over all the work to Mr. Jaya J.B Tan and Mr. Paul Wong is unacceptable.

- Sai Gon Construction Co.: No independent demand but considering those resolutions mentioned above are absolutely legal as defendant's opinion.

- Mr. Jaya J.B Tan and Mr. Paul Wong: No independent demand but agreeing with the opinions and demands of the defendant.

At the business case no. 531/2007/KDTM-ST on April 4th 2007 of Ho Chi Minh City People's Court has decided:

Clause 2, 3, Article 42, clause 1, 3 Article 52 Business law 2005 and Article 20, decree no. 101/2006/NĐ-CP on September, 21st 2006 of the government about re-registering, transfering and registering to change foreign-invested enterprises' investment certificate according to business and investment law become valid. To Sentence:

Not accepting the plaintif's demand of canceling nor recognizing the legal validity of those resolutions about re-registering in order to re-operate according to the new business law, assigning new Board of Directors and General Direct of Grand Imperial Saigon Hotel Ltd. and written notice from United Concord International Ltd. Representative signed on Oct. 4th 2006 relating to these resolutions.

Accepting the demand of defendant, recognizing the legal validity of the three resolutions which members of Board of Directors of Radiant Investments Ltd. and Sai Gon Contruction Co. signed on August 10th, 20th, and 22nd 2006 such as legal resolutions of Grand Imperial Saigon Hotel Ltd.; forcing Mr. Nguyen Van Hao to handover related work to the new Board of Directors of Grand Imperial Saigon Hotel Ltd. Mr. Jaya J.B Tan and to the new General Director Paul Wong.

Furthermore, the court also announces the court fees and right to appeal by law.

April 6th 2007, (BL: 633) the plaintif appeals all of case no. 531/2007/KD-TM-ST on April 4th 2007 of Ho Chi Minh City People's Court. Considering the first case did not judge fairly. Vietnam Law causes serious damage to UCI's benefits.

On the same date, Dr. Nguyen Van Hao also had the appealing form demanding to consider the whole first case, accepting the demand of the plaintif, rejecting the three illegal resolutions.

After hearing both concerned parties' presentation and the opinions of the persons who are concerned obligations and interests Dr. Nguyen Van Hao, representative of Sai Gon Construction Co. and authorized representative of Mr. Jaya J.B Tan (or DATÓ JAYA J.B Tan) and Mr. Paul Wong.

After hearing speeches and debates.from both parties' lawyers.

SEEING THAT:

Grand Imperial Saigon Hotel Ltd. (GISH) with headquarter located at 101 Hai Ba Trung, Dist. 1 HCMC is joint enterprise having joint venture contract signed on April 4th 1994 between

1) In Vietnam – Construction Industry Co. (SA&E) (is now Sai Gon Construction Co. (SGC)).
2) Foreign including 2 companies:
   a/ PengKalen Holdings Berhad (PengKaLem) - a corporation was established under the laws of Malaysia.
   b/ United Concord International Ltd. (UCI) – was established under the laws of Hong Kong with investment license no. 908/GP issued by National Committee of investment cooperation (UBNN and HTDT in Vietnamese) issued on July 6th 1994 and all the licences were adjusted in 1995, 1997, 2002 and 2005.

According to the adjusted licences mentioned above, GISH includes:

1) Vietnam include: Sai Gon Construction Co. (SGC)
2) Foreign party include:
   a) UCI with Dr. Nguyen Van Hao chairman of representative
   b) Radiant Investments Limited (RIL) Mr. Jaya J.B Tan as Chairman of representative.

At the first meeting's minute on August 22nd 1994, Board of Directors (BOD) according to joint-venture contract on April 4th 1994 and GISH's regulations passed on April 4th 1994 approved by

the Vietnam State Committee for Co-operation and Investment. In the minute, it was clearly stated that the foreign parties include:

a/ RengHaLen Holdings Berhal (PHB)

b/ Unitted Concord International (UCI)

They had agreed through decision: Dr. Nguyen Van Hao as the Chairman of Board of Directors and General Director of GISH. This decision was approved by the Vietnam State Committee for Co-operation and Investment, and on April 4th 2006 at document no. 1692/KHĐT-DN of HCMC's Department of Planning and Investment still confirmed the positions of the Chairman of Board of Directors and General Director that Nguyen Van Hao was in charge of.

After 12 years developing, GISH had completed and operated (1993 – 2005). Mr. Jaya J.B Tan represent RIL had not accomplished the tasks which were given by the Board, lending $29.316.000 USD according to Article 7.3 (a) Regulations of the joint-ventured company) This is the responsibility of the foreign parties (RIL and UCI). When RIL could not get the load as promised, the company is under Mr. Hao as the Chairman and general director GISH.

UIC Board of Directors Chairman and General Director, Mr. Hao with his own ability, reputation and the support of the Vietnamese Government and banks, loaned an amount of money up to 31 million US dollars to construct the hotel. Being responsible for the loan and the interests to the banks, Mr. Hao as the Chairman and General Director of GISH were not to be changed in the terms of 5 years since the date signing the contract on January 31st 2006 according to the clauses that Mr. Hao committed.

RIL as well as Mr. Jaya J.B Tan not only didn't recognize Dr. Nguyen Van Hao's big contributions and personal decision role since 1993 when the project of looking for land started, founding of joint-ventured company, construction design, and even when the project completed and came into use in 2005. Ignoring the up to 31 million US dollars loan of 5 Vietnamese banks along with some exclusive advantages for GISH, for Mr. hao, and the commitment on the contract made on Jan. 31st 2006 of no change of Board Chairman and General Director which is a particular clause to be a condition for the banks to continue giving loans, RIL and Mr. Jaya J.B Tan as well as SGC knew well about that. However, they still tried to replace a new Chairman and General Director, to kick Mr. Nguyen van Hao out of his positions in GISH by sending out

documents, which weren't passed any board meeting (once every 3 months). These 3 documents were sent out instead of issuing a board resolution, board meeting.

a/ Resolution in writing instead of a board meeting – signed on August 10th 2006. Resolution based on article 8.2 (f) of GISH regulations and demanding a resolution in writing instead of a meeting in RIL printed on August 10th 2006 sent to members of the board (BL:521) with the following content:

"GISH's Board of Directors has decided that GISH will re-register in order to operate following the new business law", (BL: 525) which has 7 signatures over 10 members in the board. (With 4 signatures from RIL, 3 from SGC. Mr. Ngo Thanh Tung has no signature and 2 UCI objections).

b/ Resolution 2 – resolution by writing instead of a GISH board meeting with the following content:

"Based on article 8.2 (f) of GISH regulations and demanding a resolution in writing instead of a meeting in RIL printed on August 10th 2006 sent to members of the board in order to be approved on related documents with the same content:

Seeing that because article 8.1 (c) of GISH regulations, RIL (former PHB-PengKaLen Holdings Berhad) has the right to recommend Chairman of the board of Directors.

GISH Board decided that the Board approved assigning Dato' Jaya J.B Tan as the Chairman of the Board took effect immediately, replacing Mr. Nguyen Van Hao (this document also contained 7/10 signatures as Resolution 1 mentioned above) (BL: 522 – 523).

c/ Resolution 3 – by writing instead of a GISH Board meeting with the following content:

Based on article 8.2 (f) GISH regulations and and demanding a resolution in writing instead of a meeting in RIL printed on August 10th 2006 (BL: 521), this resolution was sent to all the Board members to be approved on related documents with the same content:

According to Article 9.1 (c) GISH's regulations of recommending General Director…

The Board had decided "The Board approve on assigning Mr. Paul Wong as GISH new General

Director takes effect immediately, this document (BL: 519 – 520) also has 7/10 approving signatures, and 2 objections from UIC)

Seeing that the first case No. 531/2007/KDTM-ST on April 4th 2007 of the HCMC People's Court about the validity of form, content, condition (principles through the resolution) mentioned above. This judge was unjustified, not complying the contract and articles of GISH as well as the Vietnam 2005 business law, that was wrong and need to be fixed all of the first case because of the following:

1/ ***About applying the Articles to issue the 3 resolutions mentioned above is wrong and unjustified:***

All 3 Resolutions were using "based on Article 8.2 (f) of GISH's Regulations and the letter which was on August 10th 2006 of RIL. Article 8.2 (f) which the Resolutions based on and approved by HCMC People's Court as a legal basis sending out a text than a Board meeting was fixed and passed on the fix, approved by the State Committee for Co-operation and Investment. Aritcle 8.2 (f) of GISH's regulations was fixed as following:

- "Any resolution in writing or cable, Telex or Telefax of the Board has to be complied by the procedure in Article 8.2 (b)."

While Article 8.2 (b) of GISH's regulations states clearly that: "Board meetings will be held by Chairman, or the demand of 2/3 members of the Board, or by the General Director, Vice Director, at 101 Hai Ba Trung, HCMC, except being approved differently by the parties… will be announced at least 10 days before" (BL: 329).

Therefore, RIL sent the document to Vietnam at the Mr. Ngo Thanh Tung's address 235 Dong Khoi, Dist. 1, HCMC and asking for reply within 7 days. While RIL has no right holding a Board meeting as in Article 8.2 (b). Letter from Mr. DaTó Jaya J.B Tan (RIL) sent all the Board members within 7 days was complied fixed Article 8.2 (f) and Article 8.2 (b) GISH's regulations as violating the law and 2005 business law as well as not being recognized violating GISH's regulations since it was RIL recommened and RIL and SGC's Board members signed.

Seeing that modification and addition of GISH's regulations changing registered operation,

accredited, replaced, or dismissed Chairman and Vice Chairman, General Director, Vice Director, chief accountant of GISH was especially important matter which was specially defined in joint-ventured contract (Article 14.2 (1) and Article 8.1, 8.3 (1) and Article 9.1 (c) in GISH's regulations. These specific and majored issues will be decided by the Board members (by principle of agreement). At the court, the defendant (RIL) authorized representative Mr. Tran Tuan Phong also admitted. The agreement principle written on the Article and GISH's joint-ventured contract was not contradictory to the Article 52 of Vietnam 2005 Business Law. The mentioned essential issues must be 100% agreed by all the members of the Board meeting.

After deciding the resolution through the Board meeting, the joint-ventured party wants to change the GISH joint-ventured regulations and contract, to replace the Chairman of the Board or the General Director, it has to make the necessary procedures and be approved by State Committee for Co-operation and Investment (Article 21 in regulations and Aticle 23.5 in contract) (BL 376, BL 318).

2/ In the aspect of the content and conditions throughout 3 principles mentioned aboved of GISH's Board given out by RIL and SGC, the first judgement assumed that 8 out of 10 Board members had agreed, 2 disagreed (Mr. Tung had later sent a signature of agreement in text). Therefore, 5 RIL and 3 SGC Management Board representatives taking 81% statue capital assume that they can vote, sign in the documents instead of holding a Board meetings as in 2005 Business Law, a, b Clause 2, Article 52 (Stipulating for the percentage 75% or 65% of the capital at least), the Business Law is not applied correctly. In Article 52 (Business Law) states that "at least 65% members of the Board attending the meeting" not signing in the documents given out by RIL, and that 2005 Business Law stipulates clearly for that "the specific percentage depends on the enterprise's decision." GISH's regulations and joint-ventured contract stipulate clearly for the cases which deals with documents instead of the Board meeting is wrong, not complying the GISH regulations and joint-ventured contract as well as not following the 2005 Business Law Article 52.

The first case made use of joint-ventured contract Article 14.2.2 as well as joint-ventured regulations Article 8.3.2. Then considering the major number won over the agreement principle.

In this dispute, the first case assumed the majority rules would replace the agreement rules and then apply for the case of RIL and SGC signed on 3 documents instead of the Board, which is worse. Joint-ventured regulations and contract will be changed in the procedure, which is stipulated in contract and regulations as well as the approval of State Committee for Co-operation and Investment to be complied. While the contract and regulations have not been edited, the first case has applied it already. The first case's judgement initiatively explains for the Board members, business contract, and regulations, considering Article 8.3 (2) business regulation replacing Article 8.3 (1) business regulation to legalize the 3 resolutions which was not complied with the business contract and regulations mentioned above to be compatible with Aticle 52 2005 Business Law is completely unjustified, against the law, needed to be unauthorized.

It is not random that the GISH's regulations and contract authorized by State Committee for Co-operation and Investment clearly states that: "These important issues need to be decided as agreement principle (100%) by the Board (Article 14-2-1 joint-ventured contract and Article 8-3-1 business regulations) and those issues have to be authorized by State Committee for Co-operation and Investment (Article 23.5 business contract and Article 21 business regulations). Because of that, the 3 resolutions proposed bu RIL in text with the content stipulated by the business contract and regulations that having to pass the Board meeting with the 100% agreement principle. RIL and SGC didn't comply the business regulations, the contract and 2005 Business Law. UCI and Mr. Nguyen Van Hao's suing and appealing demands from the court to decide not to recognize the legal validity of the 3 resolutions as well as demand to cancel the resolution of Board Chairman and resolution of General Director that the Board members of RIL and SGC signed on August 10th 2006 and August 22nd 2006, specifically:

- Demand to cancel the documents signed by Mr. Jaya J.B Tan on October 4th 2006 about (a) changing the Board Chairman and General Director and (b) holding the Board meeting on October 17th 2006.
- Demand to continue remain the validity of HCMC's Department of Planning and Investment no. 1692/KHĐT-DN on April 4th 2006 confirming the personel of GISH is justified and cancel the validity and edit all the first case judgement.

The first case is wrong about the RIL and SGC's demand of recognizing the legal validity of the three resolutions mentioned above. This is not the independent demend of the plaintif, requesting and giving basis of RIL and SGC just plainly protects their own rights.

The 3 Resolutions of RIL and SGC in text instead of holding a board meeting are not legally valid. Therefore, Mr. Dato' Jaya J.B Tan is not the Board Chairman and Mr. Paul Wong is not the General Director of GISH. Mr. Nguyen Van Hao is still the Board Chairman and the General Director of GISH which was re-confirmed by the HCM State Committee for Co-operation and Investment in document no. 1692/KHĐT-DN on April 4th 2006. Mr. Nguyen Van Hao does not have to handover all the related works to Mr. Jaya J.B Tan and Mr. Paul Wong as in the first case's judgement.

Since the accepting all of the demand of the plaintif and the appea of UCI and Mr. Nguyen Van Hao, the business charges for the first case and the appealing will be adjusted to be suitable for the Decree 70/CP.

Because of that, according to Article 275-276 code of civil procedure.

DECISION:

Edit the whole first case judgement:

Accepting the form and demands for the appeal of UIC and Mr. Nguyen Van Hao.

Judgement:

1. Accepting the plaintif's appeal of cancellation or disrecognition the legal validity of the resolutions of re-registering to operate as the new business law, authorizing the Grand Imperial Saigon Hotel new Board Chairman and General Director and newsletters of Radiant Investments Limited (RIL) signed on Oct. 4th 2006 related to these resolutions.
2. Accepting the appeal request of the plaintif of not recognizing the legal validity of the three resolutions as the legal resolutions that RIL and SGC's Board members signed on August 10th, 20th, and 22nd of 2006 of GISH Board of Directors (including: Resolution of

Re-registeration, Resolution of the Board Chairman and Resolution of General Director). Mr. Nguyen Van Hao is the Board Chairman and General Director of GISH. Mr. Nguyen Van Hao does not have to handover all the related wirj ti Mr. Jaya J.B Tan and Mr. Paul Wong.

3. Charges:

a) UCI does not have to pay for any business charges for the first case nor the appeal. UCI and Mr. Nguyen Van Hao's all the fees will be refunded (receipt no. 003353 on Nov. 6th 2006, and 004749 on April 7th 2007, and 004689 on April 10th 2007 volume no. 0094-0095 of Ho Chi Minh city Judgement implementation Room.

b) RIL (Radiant Investments Limited) has to pay for the business first case: 500.000 dong (deduction of court fees 250.000 dong), 250.000 (two hundreds fifty thoudsands dong) must be paid.

4. Appeal judgments are legally enforceable from the date of the pronouncement.

Source:

http://www.elawreview.com/Default.aspx?tabid=213&ctl=Detail&mid=695&ArticleID=ARTICLE07110028

Appendix C

Mr Nguyen Van Kham, who was elected to be the Chairman of the Board of Directors of Day Sai Gon, Manufacturing – Services – Trading joint-stock company, sues and demands Mr Tran Hai Au and the steering committee to hand over work, document, records, facilities and the company stamp for the new Board of Directors. (09:34 – 01/04/2008)

The jury believe that there are enough bases to determine that in the extraordinary shareholders' meeting there were 48 delegates, which are shareholders or shareholder representatives, holding 157.938 shares, reaching the rate 99,81% of 158.238 shares which have the right to vote.

According to Clause 1,4 and 5, Article 22 of company regulations as well as the law in force at Clause 1 , Aritcle 76 and Clause 1, Clause 2 , Article 77 of Enterprise Law 1999 (valid at the time the meeting was carried out), there are basis to claim :

- There are enough conditions for the extraordinary shareholders'meeting on 15/5/2006 to be carried out (the shareholers attended represents at least 51% of the shares with the right to vote)
- Decisions of the extraordinary shareholders' meeting on 15/5/2006 were valid to perform (voted or balloted by at least 51% of the present)

Number of Judgement : 511/2006/KDTM-ST

Date : 12/10/2006

About : Dispute between company members

On 09 and 12/10/2006, at court-room of Ho Chi Minh city People's Court, first instance hearing of publicity the case number 352/2006/TLST-KDTM dated 08/06/2006 about dispute between the members of Day Sai Gon – Manufacturing- Services – Trading joint-stock company (Day Sai Gon in short) was on trial, according to "Decision on bringing the case to trial" number 1431/2006/QDST – KDTM dated 28/8/2006 between :

Plaintiff : Mr. Nguyen Van Kham

Address : 115/84 Le Van Sy, ward 13, Phu Nhuan district, Ho Chi Minh city

(present)

Defendant : Mr. Tran Hai Au

Address : 198 Ba Hom, ward 13, district 6, Ho Chi Minh city

(present on 09/10/2006, absent on date of pronouncement 12/10/2006)

People have rights and obligations concerned :

49 Shareholders of Jute Sai Gon , Manufacturing – Services – Trading joint-stock company (according to shareholder list enclosed)

Protecting rights and legitimate benefits of defendant : Lawyer Nguyen Van Trung and Lawyer Nguyen Van Hoa, under the Ho Chi Minh city Lawyer's association

REMARK

Plaintiff's statement :

On 15/5/2006, Day Sai Gon held the Extraordinary Shareholders'meeting to revoke the mandate of first-term Board of Directors and Board of Controllers, meanwhile, elect the second term Board of Directors and Board of Controllers (2006-2011) with the number of present shareholders was 48, represents 157.938 shares, reach the rate 99,81%.

Afterwards, on 16/5/2006, the Board of Directors of new tenure were unanimous to elect Mr Nguyen Van Kham as the Chairman of the Board of Directors and the authorized representative of company.

However, the previous dismissed Board of Diretors refused to hand over documents, records and the company stamp for the new Board of Directors.

Therefore, plaintiff started proceedings against Mr. Tran Hai Au and the dismissed steering committees and demand the Court to force them to hand over work, documents, records, facilities and company stampe to the new Board of Directors so that the company can stabilize and go on manufacturing and trading.

Defendant's statement :

Demand the Court to cancel the decisions of the Extraordinary Shareholders'meeting on 15/5/2006 because the meeting was not carried out as the right sequence set in plan and regulations to hold meetings, violated the company regulations and Enterprise Law.

Statement of people have rights and obligations concerned :

A number of shareholders agreed with plaintiff's demand and a number of shareholders agreed with defendant's demands.

The Court summoned for mediation but the person concerned can not negotiate with each other about resolving the case since some shareholders suggest the court to condemn by defaut (not summon for mediation), and some present shareholders were not unanimous in resolution for the case.

At the trial to day :

Plaintiff :

Request Mr. Tran hai Au and members of the dismissed first-term Board of Directors to hand over immediately assets, documents, records and company stamp to the new Board of Directors so that the company can stabilize and go on manufacturing and trading.

Defendant :

Not approve plaintiff's request and demand the Court to repeal the decisions of the Extraordinary Shareholders'meeting on 15/5/2006 because the meeting was not carried out as sequence set in plan and regulations for holding meeting, violated company regulations and Enterprise Law.

People have rights and obligations concerned :

A number of shareholders agreed with plaintiff's request. A number of shareholders agreed with defendants' request.

Comments of Lawyers to protect the rights of defendants :

- Handling the case in a court of District 1 People's Court is not appropriate. The People's Court brought the case to court is not legitimate.
- About the content, suggest the jury base on the Law of Commerce 1999 to judge.
- Day Sai Gon company regulations is a document which has legitimate validity and the shareholders must comply with.
- The Extraordinary Shareholder's Meeting on 15/5/2006 violated Clause 3 Article 72 of Enterprise Law1999 about the time to summon meeting.
- Outsiders participated in Organization Board is not legitimate
- The meeting violated Clause 1 Article 19 of company regulations the constituent of attending shareholders. Suggest the jury to check whether 26 left shareholders had the right to attend the meeting. (As the result of defendant's verification, there are 8 shareholders which do not have the right to attend because owing less than 1% of charter capital).
- Since the meeting had the shortcoming (not perfoming article A8), which could not be resolved at the meetings, it was not appropriate to the meeting's regulation for the chairman to stop the meeting.

Suggest the Jury accept defendant's request for cancelling all decisions of the Extraordinary Shareholders'meeting on 15/5/2006

SEEING THAT

After investigating the files of the case which were verified at the trial and base on the result of discussion at the trial, the jury has commented :

1. About the jurisdiction :

This is a commercial dispute (between members in a company, related to the operation of company). Defedent resides in Ho Chi Minh city. Therefore, base on Article 79 of Enterprise

Law 1999, Article 107 of Enterprise Law 2005 and Clause 3 Article 25, Clause 1 Article 34, Point a Clause 1 Article 35 of Code of Civil Procedure, this case falls within the jurisdiction of Ho Chi Minh People's Court.

2. About the prescription of proceeding :

On 15/5/2006, Day Sai Gon hold the Extraordinary Shareholders' meeting to approve the decision of dismissing the first-term Board of Directors, Board of Controllers and electing the second-term Board of Directors, Board of Controllers. On 18/5/2006, the Court received the complaint of Mr. Nguyen Van Kham and the complaint of Mr Tran Hau Au on 24/5/2006.

Base on Article 79 of Enterprise Law 1999 (valid at the time the dispute arose) and Clause 1, point a Clause 3 Article 159 of Code of Civil Procedure, plaintiff and defendant drew up a petition to the Court to resolve the case in the required time. (90 days since approving decisions of Shareholders'meeting). Hence, the case need to be handled and resolved.

3. About defining the status of the person who signed the petition and plaintiff, defendant in the case:

When signing petition, both Nguyen Van Kham and Tran Hai Au used the name of Day Sai Gon joint-stock company (as the legitmate representative of company) and requested for a resolution with the other side.

The People's Court district 1 recevied the complaint from Mr. Nguyen Van Kham on 18/5/2006 and handled the case in 18/05/2006 with the status of the parties defined by proceeder as above (plaintiff is Day Sai Gon , represented by Mr Kham and defendant is Mr. Tran Hai Au), and defined the legal relationship with dispute as "asset proprietary right".

Ho Chi Minh People's Court recevied the complaint from Mr. Tran Hai Au on 24/5/2006 and handled the case in 8/6/2006 with the status of the parties defined by proceeder as above (plaintiff is Day Sai Gon, represented by Mr Au and defendant is Mr. nguyen Van Kham), but defined the legal relationship with dispute as "Dispute between members of company"

(relationship between members of company affects the company operation) according to Clause 3 Article 29 of Code of Civil Procedure.

After handling, the case proceeded by Mr Nguyen Van Kham was forwarded to be settled within the jurisdiction. Consider that there is a need to join 2 above cases in to 1 to resolve since they had the same legal relationship with dispute between members of a company according to Clause 3 Article 29 of Code of Civil Procedure (defining the legal relionship as asset proprietary by People's court district 1 was not accurate), Ho Chi Minh People's Court made a decision number 298/2006/QD-NVA dated 20/6/2006 on joining two cases into one.

At the same time, seeing that the parties (Mr Nguyen Van Kham and Mr Tran hai Au) were disputing over the management rights and using the name of the company (at regulation in Clause 1 Article 30 of Enterprise Law 1999), to ensure that the judgement is obejective and accords with the nature of dispute relationship between the parties as dispute over shareholders of a company (not between company and shareholder), Ho Chi Minh People's Court redefined the accurate status of proceeder as personal status (shareholder) and Mr Nguyen Van Kham as plaintiff (proceeding beforehand), Mr Tran Hai Au as defendant (proceeding later); did not accept the status as legitimate representative of company which 2 parties had self-defined in the complaints.

4. About comdemning by default of people who have rights and obligations involved :

At the trial today, Ms Nguyen Thanh Xuan (shareholder) and Ms Dang Kim Lan (one of 3 authorised representatives for LISKIN's shareholders) were absent although being summoned the third time. Besides, there are 5 absent shareholders, including : Ms Ha Thi Thanh Thuy, Ms Huynh Thi Bay, Ms Le Thi Hong Lan, Ms Huynh Thi Tam and Ms Bui Thi Diem Trinh , but they had laid petitions for comdemning by default. Apartly, shareholder Nguyen Dinh Le was present at the trial in the morning and absent in the afternoon on 09/10/2006, but he was summoned the third time. Base on regulation at Clause 2 Article 201 and Article 202 of Code of Civil Procedure, the Court tried the case in absentia of people with rights and obligations involved stated above.

5. About the content of dispute :

a) Consider the plaintiff's demand for Mr Tran Hai Au and members of the dismissed first-term Board of Directors to hand over immdiately responsibility, asset, documents,

records and company stampt to the new second-term Board of Directors elected at the Extraordinary Shareholders'meeting on 15/5/2005 :

Base on the evidences provided by persons concerned and verified at the trial, including :
- Report of the Extraordinary Shareholders'meeting on 15/5/2006, chaired by Mr Bui Van Hoang Them, made by secretaries Nguyen Thi Ngoc Giau, Dang Thi My Hanh
- The Extraordinary Shareholders'meeting programme on 15/5/2006
- List of representatives attending the Extraordinary Shareholder's meeting on 15/5/2006
- Report of dimissing first-term Board of Directors and Board of Controllers
- Report of cheking the votes for second-term Board of Directors and Board of Controllers

With the confirmation of 26 left shareholders (represent for 51.30% of votable shares of the company) , after the breakdown that a number of shareholders left the meeting (at about 20:45 on 15/5/2006); the confirmation at the trial of Mr Bui Van Hoang Them, chairman of the meeting, members in Board of Election (including Mr Dang Tran Cuong, Mr Nguyen Van Son, Mr Nguyen Van Tien, Mr Ho Thanh Vo) and defendant – Mr Tran Hai Au, there are enough basis to determine :

- At the extraordinary shareholders'meeting, there were 48 representatives who are shareholders or shareholders delegates that owes 157.938 shares, reaching the rate 99,81% of the number votable shares of 158.238 (160.000 shares – 1.762 bought back by the company) (because common share is the only one kind of share of company)

- The meeting was carried out to the stage of checking votes for second-term Board of Directors and Board of Controllers, approving decision of dimissing first-term Board of Directors and Board of Controllers; completed voting for second-term Board of Directors and Board of Controllers and carrying out checking the number of votes.

- The result of cheking votes for second-term Board of Directors and Board of Controllers as follows :
+ Mr Nguyen Quoc Dinh, Tran Thanh Huy, Nguyen Van Kham, Thai Thanh Nam and Ms Nguyen Thi Thu Lan are all elected into Board of Directors with the rate of 51.30% of votable shares of present shareholders. The other candidates are elected with the rate less than 49%.

+ Mr Nguyen Viet Nhuan, Pham Minh Tri and Ms Nguyen Thi Ngoc Lien are elected into Board of Controllers wit the rate of 51.30%. The others are elected with the rate less than 49%.

Although Mr Tran Hai Au and a number of shareholders left the meeting before announcing the result of checking votes and did not recognised this result but 26 shareholders owing 51.30% of votable shares had the rights to continue the meeting, confirmed by reports and confirmed at the trial that they had voted for the above shareholders, if adding up the shares they own, it will march the results written in the report of checking votes.

From the above events, base on Clause 1,4 and 5 , Article 22 of Company regulations , as well as Clause 1 Article 76 and Clause 1,2 Article 77 of Enterprise Law 1999 (valid at the time the meeting carried out), there are enough basis to affirm :
- There were enough conditions for the Extraordinary Shareholders'meeting on 15/5/2006 to be carried out (the attending shareholders represents at least 51% of votable shares)
- Decisions of The Extraordinary Shareholders' meeting on 15/5/2006 are valid to implement (voted or balloted by attending shareholders with the rate over 51%)

Base on Article 6,26,35 of Company regulations as well as Article 70,70,88 of Enterprise Law 1999; Article 96,108,109,121 of Enterprise Law 2005; plaintiff's demand for Mr Tran Hai Au and members of the dismissed first-term Board of Directors to hand over immediately responsibility, assets, documents, records and company stamp to the new Board of Directors elected at the Extraordinary Shareholders'meeting on 15/5/2006 has enough basis annd is legitimate, need to be approved.

b) Consider the defendant's demand to counter-claim to cancel the decisions of the Extraordinary Shareholders'meeting on 15/5/2006

As analysed above, since the decisions of the extraordinary shareholders'meeting on 15/5/2006 accorded with Company regulation and are legitimate, defendant's demand has no ground to be approved.

About the specific excuses that the defendant made to request for cancelling the decisions of the extraordinary shareholders'meeting on 15/5/2006, the Jury had the following comments :

- About the first reason (violating the time of summoning the meeting) :

Since the Board of Directors did not summon the Shareholders'meeting as requested in the required time of 30 days, base on Clause 3 Article 18 of Company regulations and Clause 3 Article 71 of Enterprise Law 1999, Board of Controllers took place of Board of Directors to summon meeting on 15/5/2006 (Law as well as company regulations do not set the time-limit for Board of Controllers to summon the meeting). Therefore, there is no legal foundations to claim that the company had violated the time of summoning the meeting.

- About the second reason (There is oursider – Mr Nguyen Hong Quang in the organization Board)

Organization Board is only an assistant for Board of Controllers in preparing and holding meeting, law as well as company regulation has no rules about constituent of organization Board. Therefore, there is no ground to cancel the decision of Shareholders'meeting because of this reason.

- About the third reason (constituent of shareholders attending the meeting did not accord with regulations of owing at least 1% of charter capital) :

Defendant quoted Clause 1 Article 19 of Company Regulations to claim that constituent of shareholders which were summoned and attended the meeting was not pursuant to Regulations (a number of shareholders owes less than 1% of charter capital). Nevertheless, this regulation of Company Regulations is opposed to rules precribed at Article 15 and point a Clause 1 Article 53 of Enterprise Law 1999 (Every common shareholder has the right to attend and vote on every issue under the competence of Shareholders's meeting). Therefore, the above regulation of Company Regulations has no validity to perform.

- About the fourth reason (Shareholder's proxy was not certified by competent government agency) :

The Law as well as Company Regulations has no regulations that shareholder's proxy to attend meeting must be certified by competent government agency). On the other hand, proxies (the form which shareholders use when they need to delegate others) which organization board issues are appended company stamp to, and in fact, since the meeting opened up to now, no shareholders has complained about the fact that the meeting accepted their representatives

with no proxy. Therefore, there is no grounds to require for cancelling decisions of Shareholders'meeting because of this reason.

- About the fifth reason (list of candidates for Board of Directors and Board of Controllers is not verified pursuant to Article 27 and Article 35 of Company Regulations and not approved by the meeting according to Congress statutes and programme.

Firstly, there is no rules in Company regulations as well as the Law that requires to verify the standards of candidates for Board of Directors and Board of Controllers at the meeting before voting for Board of Directors and Board of Controllers.

Secondly, Congress Programme (Section A8) only stated that "Approve the list of shareholders nominating for second-term Boards of Directors and Board of Controllers…", not stated that "Approve the list of candidate for second-term Board of Directors and Board of Controllers…" . About the content of this section, 2 parties had different explainations : defendant claimed that it was the list of candidates while plaintiff disclaimed and asserted that it was the list of nominators, not candidates.

Thirdly, regardless of the content of section A8 above (according to plaintiff or defendant), there is a fact that : all of the representatives (shareholders or delegates) , who attend the meeting, agreed to vote and in fact completed voting for second-term Board of Directors and Board of Controllers, with no complaints or demands chairman to halt the meeting to perform section A 8 before electing second-term Board of Directors and Board of Controllers. Therefore, base on the behaviour of the present representatives, casting votes, there is foundation to claim that the congress 100% unanimously approved section A 8 (as plaintiff's explainations), i.e. the meeting was carried out as the sequence stated in the congress programme which summoner had sent to shareholders before carrying out the meeting, or the congress was 100% unanimous to skip section A 8 (as defendant's explainations), i.e. the congress was agreed to change to programme of meeting (not only the decision of some attending shareholders). In any case (carried out as order of the programme or change it), the meeting was carried out validly according to Clause 6 Article 22 of Company regulations as well as regulation at Clause 4 Article 76 of Enterprise Law 1999 since it is approved by 100% attending representatives. There is absolutely no violation in this matter.

Fourly, if the representatives (shareholders of shareholder delegates), which left the meeting after voting for second-term Board of Directors and Board of Controllers , were considered to be absent at the congress (i.e giving up the right to attend the congress themselves), there were still enough conditions to carry out the congress as regulations because the number of

remaining shareholders made up over 51% of votable shares. (82028 shares/ 158.238 shares = 51.21%) and was enough to approve decisions of congress (since 100% of the remaining representatives agreed by votes)

Therefore, demand to cancel the decisions of Shareholders' meeting because of this reason is not legitimate and groundless.

c) About Mr. Tran Hai Au's demand stated in letter of petition for Mr Nguyen Van Kham to hand over the company offices :

It is not legitimate for Mr Nguyen Van Kham to unilaterally use force to blockade company offices when not completing the procedure of handing over company management responsibility. As request of Mr Tran Hai Au, on 21/6/2006, the Court made the "Decision on applying temporary urgent method" number 29/2006/QD-BPKCTT forcing Mr Nguyen Van Kham to hand over immediately all of the company offices key he was holding to people who have management responsibility of concerned departments and Mr Kham did implement. At the trial today, defendant did not request the Court to resolve this problem, hence, the Jury believe that there is no need for a resolution decision any more.

6. About legal costs :

Base on Clause 1 Article 131 of Code of Civil Procedure and Article 15, 18 and 19 of Decree 70/CP dated 12/6/1997 of Government about legal costs, court fees :

- Mr Tran Hai Au has to suffer first instance legal cost of 500.000 dongs for case with no scale of price
- Return full-payment in advance for legal cost made by Day Sai Gon joint-stock company.

Because of the possibility that :

DECISIONS :

According Article 70, 77, 80 , 81 of Enterprise Law 1999 and Clause 2 Article 109 of Enterprise Law 2005;

1. Approve demand of plaintiff, force Tran Hai Au and first-term Board of Directors of Day Sai Gon – Manufacturing-Services-Trading joint-stock company to hand over responsibility, assets, documents, records and company stamp to second-term Board of Directors (including Mr Nguyen Quoc Dinh, Mr Tran Thanh Huy, Mr Nguyen Van Kham, Mr Thai Thanh Nam and Ms Nguyen Thi Thu Lan).

2. Reject demand of defendant to cancel all of the decisions of the Extraordinary Shareholders'meeting on 15/5/2006 of Day Sai Gon Manufacturing-Services-Trading joint-stock company.

3. Continue maintaining temporary urgent method applied Decision number 29/2006/QD-BPKCTT dated 21/6/2006 of Ho Chi Minh People's Court until there is another decision of the court or until execution.

4. About the legal costs :

- Mr Tran Hai Au has to suffer the first instance legal cost of 500.000d (five hundred thousands vietnamdongs) , submitted at the Enforcing city civil court Ho Chi Minh.
- Mr Nguyen Van Kham does not suffer the first instance legal cost.
- Refund the legal cost already paid 50.000 dongs (according to Receipt of money number 008303 dated 18/5/2006 of the Enforcing city civil court District 1) and 250.000 dongs (according to Receipt of money number 002174 dated 08/6/2006 of the Enforcing city civil court Ho Chi Minh) to Day Sai Gon Manufacturing-Services-Trading company

5. Persons concerned have the right to appeal the judgement within :

+ 15 days from the date of pronouncement, for the persons concerned present
+ 15 days from the date of notification, for the persons concerned absent.

Appendix D

Tuong An Vegetable Oil: The key is the conflict between the State's profit and that of the authorized representative of the State

Dr. Le Net

For two consecutive days – 27 and 28 of April 2008, Thanh Nien and Securities Investment Newspapers reported in details the concerns of minority shareholders at the Shareholder's Meeting of Tuong An Vegetable Oil Joint Stock Company (TAC) held on April 24 2008. On April 29 2008 Vietnam Association of Financial Investors (VAFI) sent official letters to the Ministry of Finance, the Ministry of Industry and Trade, Vegetable Oil Company and Aromas and Cosmetics of Vietnam (VOCARIMEX) to report that majority shareholders of TAC is Vocarimex who had been impeding the minority shareholders in order to replace the General Director of TAC, a man who had helped TAC to attain a great achievement in the year 2007. However, the problem is not laid on the fact that the majority shareholder impeded the minority ones.

If Vocarimex used their own shares to vote, there would be nothing to say – they have to face all the economic consequences which they had caused. However, the problem underlines is that Vocarimex, as an authorized representative of the State, has used the State's capital in order to seek for its own benefit, going against the State's policy on equitization. Therefore, at the end neither Vocarimex nor its leaders suffer the economic loss but the State and its people do. In this article, I want point out the main reasons of the problem; that is the conflict between the State's profit and that of the authorized representative of the State. This is one of reasons why public investment has never gained its effect and why many equitized enterprises are not honest and effective in their business.

According to Clause 3, Article 63 of Law on State owned Enterprises 2003, Vocarimex is only an authorized representative of the State in TAC. As an authorized representative, Vocarimex and its representatives in TAC have to be responsible and compensate the loss in accordance with the law if it takes advantage of its right as an authorized representative, irresponsibly causing loss for the company and the State (Clause 4, Article 72 of Law on State owned Enterprises). However, pursuant to the provisions on the relationship between the authorized representative and the person it represents in Clause 1, Article 139 of the Civil Law 2005, the authorized representative is entitled to act "for the benefit of the person it represents" (the State's benefit). Therefore, what is the benefit and purpose of the State when it contributes its capital in TAC and whether the authorized representatives of State are faithful to that benefit?

The purpose and profit of the State in such equitized enterprise like TAC is to explicitly mobilize individual's capital in accordance with the market's principle and the development of capital and security market (Article 1 of the Decree 187/2004/ND-CP on equitization). According to the record of the Shareholder's Meeting held on last April 24, Tuong An Vegetable Oil Joint Stock Company (TAC) had its revenue amounting VND 2,554 (Two thousand five hundred and fifty four) billion in 2007; profit excluding Tax is VND 125.7 (One hundred twenty five point seven) billion, exceeding 153.3% (One hundred fifty three point three) one year plan. The result of this achievement is due to the General Director and the Members of Directors who had initiatively stored a great amount of materials in March and April 2007 right before the increase of the materials (according to Securities Investment dated on April 29, 2008). Therefore, the General Director of TAC was voted by Vocarimex as untruthful person because she had paid attention to the State's profit as well as that of the

remaining shareholders. For whom did Vocarimex and members of the Board of Directors authorized by Vocarimex represent?

Firstly, we can see that Vocarimex represented its own profits. The fact that it initiatively imported materials for oil last year made a great profit to TAC is due to the General Director - an authorized legal representative of TAC who initiatively and directly imported oil from foreign investors, namely Wilma. While members who represented Vocarimex wanted TAC to buy oil imported by Vocarimex (amounting 90% of the price). At the Shareholder's Meeting held on April 24, 2008, the shareholders happened to know that the Chairman of the Board of Directors – Deputy of General Director of Vocarimex, together with two other members of the Board of Directors, appointed by Vocarimex, authorized a regulation on purchasing illegal oil that invisibly force TAC to purchase oil from Vocarimex. It can be easily recognized that this invisible regulation has led to a serious conflict and the business secret of TAC is not ensured. Normally, such kind of purchase should be authorized through a procurement in order to ensure the secret information on price, justice between parties (Clause 9, Article 12 of the Law on Procurement), however, in this regulation, all information relating to the price from the suppliers have to be sent to both the General Director and the Chairman of the Board of Directors of TAC, it means the Deputy of the General Director of Vocarimex, who was also participating in the procurement. Besides, the relationship between TAC and Vocarimex is related, therefore, it had to be carried out in accordance with the Article 120 of the Law on Enterprise 2005. Consequently, TAC could not contact other suppliers and had to depend on Vocarimex for the materials. The fact that the mother company, by its illegal transaction, made its subsidiary company suffered from the loss is to violate the Article 147 of the Law on Enterprise 2005.

Secondly, Vocarimex had been taken advantage by some individuals who were managing the company for their own profits. In fact, pursuant to the Article 119 of the Law on Enterprise 2005, the members who belong to the Board of Directors appointed by Vocarimex are entitled to act on the supreme profits of TAC. However, they did the opposite: replacing the legal representative for TAC who indirectly work, and at the same time is a competitor of TAC, controlling the whole purchase process of the TAC, requesting the General Director of TAC to disclose business secret to Vocarimex, voting the General Director as an unreliable person because of the personal conflict (though they did not admit it), refusing to announce all the information of the ballots when being directly asked by shareholders at the Shareholder's Meeting. These behaviors violate the Article 119 and will be settled in accordance with Clause 4, Article 108 of the Law of Enterprise. To be noticed the fact that there was no unanimousness among 3 authorized representatives of the State in TAC regarding the vote of the General Director as an unreliable person, violates Clause 5, Article 72 of the Law on State owned Enterprises. The person who voted the General Director as an unreliable person was the one who prepared the statement of the Board of Directors in order to apply for the approval for the new General Director showing the implicitness in their behavior. This illustrates that some members who are the State's representative have used the State's capital in order to seek for their own profit.

Let's examine whether these people are worthy enough to be the authorized representative of the State? This is the reason why VAFI have sent an Official Letter to the Ministry of Finance, a higher representative in managing the State's capital in order to request for the reconsideration on the attitude of Vocarimex's representative and authorized representative appointed by Vocarimex in TAC. VAFI also sent an Official Letter to the Ministry of Industry and Trade and the organization who is in charge of Vocarimex to request these ministries to supervise the attitude of Vocarimex's representative. If the Ministry of Industry and Trade and the Ministry of Finance are really the guards of the State's money in TAC, Vocarimex

would surely be asked by these Ministries to explain the reasons why they took advantage of their rights to seek for their own profit, going against the State's profit in their own TAC.

The State's capital is contributed by its people. It needs to be closely protected so that others will not take advantage of it. We have the saying "if the property of the Buddha lost, it would be compensated 100 times". We should ask ourselves whether the State should allow these individuals who represent Vocarimex continue to challenge public opinion and "using the State's capital as if your own capital"?